

MILITARY LAW REVIEW Vol. 28

Minor Symposium
PROFESSOR MORGAN AND
THE DRAFTING OF THE CODE

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HEADQUARTERS, DEPARTMENT OF THE ARMY
APRIL 1965

PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

Articles, comments, and notes should be submitted in duplicate, triple spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. Footnotes should be triple spaced, set out on pages separate from the text and follow the manner of citation in the *Harvard Blue Book*.

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WILLIAM WINTHROP

Acting Judge Advocate General

1881

Colonel William Woolsey Winthrop was born on 3 August 1831 in New Haven, Connecticut, the youngest son of Francis Bayard Winthrop by his second wife, Elizabeth Woolsey. His father was a lawyer and practiced in New Haven and was a descendant of John Winthrop, the first Governor of Massachusetts. His mother was a great-granddaughter of Jonathan Edwards, the great Puritan theologian and author and was the niece of Timothy Dwight and the sister of Timothy Dwight Woolsey, both Presidents of Yale. His elder brother, Theodore, became a well-known author.

Colonel Winthrop was graduated from Yale University in 1851 with a B.A. degree and from Yale Law School in 1853 with an LL.B. degree. From 1853–1854 he pursued graduate studies at Harvard Law School. In 1855 he began the practice of law in Boston and thereafter moved to St. Anthony's, Minnesota. He returned to New York City in 1860 and in partnership with a former Yale law school classmate, Robbins Little, of Boston, later an instructor in International Law at the U. S. Naval Academy, practiced law until 1861.

Three days after the fall of Fort Sumter, in response to President Lincoln's calls for 75,000 volunteers on 17 April 1861, Winthrop enrolled as a private in Company F, 7th Regiment, New York Militia. His eldest brother, Theodore, a Captain in the same regiment was killed two months later and, out of respect for his mother's wishes, he declined the offer of a commission as Captain in that regiment. However, on 1 October 1861, he accepted a commission as 1st Lieutenant in Company H, 1st U.S. Sharpshooters. On 22 September 1862, Lt Winthrop was promoted to Captain, for gallant conduct in the field and, except for a one-month period when he served as an aide-de-camp to Brigadier General J. J. Bartlett, Commanding General, 2d Brigade, 7th Division, 6th Army Corps, he remained with the 1st U.S. Sharpshooters.

On 14 April 1863, Captain Winthrop was assigned to duty in the Judge Advocate General's Office at Washington where he was to remain on duty for the following nineteen years. During the

Civil War the Office of the Judge Advocate General was staffed with seven or eight judge advocates and acting judge advocates, of whom Captain Winthrop became one. Winthrop was promoted to Major, and in the general brevet of 13 March 1865 he was brevetted Lieutenant Colonel of Volunteers for his services in the field and Colonel of Volunteers for his services in the Office of the Judge Advocate General.

The act of 28 July 1866 (14 Stat. 332) authorized the temporary retention in the service of not to exceed ten of the judge advocates then in office and Major Winthrop was one of those retained. By the Act of 25 February 1867 (14 Stat. 410), Winthrop was given the status of a permanent officer of the Regular Army.

When Major General William M. Dunn, The Judge Advocate General, retired on 22 January 1881, Major Winthrop was the senior officer on duty in the Office of the Judge Advocate General. On 2 February 1881 the Adjutant General issued an order which read as follows:

The President directs that Major William Winthrop, Judge Advocate, be assigned to act as Judge Advocate General, until a Judge Advocate General shall have been appointed and entered upon duty.

On 18 February 1881, President Hayes filled the office of Judge Advocate General by appointing to that office Major David G. Swaim of Ohio. Swaim was five years junior to Winthrop and had not served as a judge advocate during the war.

In the spring of 1882 Major Winthrop was assigned to Headquarters, Department of California, Presidio of San Francisco. In 1877, at Washington, he had married Miss Alice Worthington and because of her delicate health his transfer to California was delayed until 1 October 1882.

Major General John M. Schofield, who was in command at San Francisco in 1882, requested Major Winthrop's assignment to each of his subsequent commands: 1883, Military Division of the Missouri; 1885, Headquarters, Chicago; and 1886, Military Division of the Atlantic, Headquarters, Governors Island, New York. On 5 July 1884 Major Winthrop was promoted to Lieutenant Colonel.

On 28 August 1886, he reported to the United States Military Academy as professor of law and remained in that position until 1890. He then returned to Washington and served in the Office of the Judge Advocate General until his retirement. On 3 June 1895 he was promoted to Colonel and appointed Assistant Judge Advocate General. On 3 August 1895, then 64 years of age, he was retired for age after 36 years of service,

Colonel Winthrop had many interests beyond his military duties. In 1872, he translated the *Militär Strafgesetzbuch*, the German Military Penal Code. He was a botanist, traveller (he toured Europe 12 times between 1872 and 1896 and toured Canada in 1894) and was a keen student of the history of the American Revolution. He contributed to numerous periodicals and scientific publications; however, his principal interest was in the scientific study and exposition of military law and he wrote several books in that area. His greatest work, however, was *Military Law and Precedents*,¹ first published in Washington in 1886 and dedicated to his old chief, General Joseph Holt, Judge Advocate General from 1862 to 1875. Colonel Winthrop's *Military Law and Precedents* was republished in 1896, 1920 and again in 1942.

After ten years of laborious research, he completed the manuscript of *Military Law and Precedents* in 1885. In a letter dated 10 November 1885, he described this work to Secretary of War Endicott and stated:

No pecuniary profit is expected by me from this work—such books barely pay expenses. But, especially in view of the embarrassing, and to me humiliating, *status* of my department of the army, consequent upon the trial and sentence of its official head [Major General Swaim], my literary work is now the only means by which I can add to my reputation or record as an officer or perform satisfactory public service of a valuable and permanent character. There is no existing treatise on the science of military law in our language—no collection even of the many precedents on the subject, many of which are of great value both legally and historically. My object in the extended work prepared by me is to supply to the body of the public law of the United States a contribution never yet made. My book is a *law book*, written by me in my capacity of a lawyer even more than in that of a military officer; and the reception which my previous work [the Digest] has met with from the bar and the judges, encourages me to believe that my present complete treatise will be still more favorably appreciated.

On 8 April 1899 in his 68th year, Colonel Winthrop died at Atlantic City, New Jersey.

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MINOR SYMPOSIUM

PROFESSOR MORGAN AND THE DRAFTING OF THE CODE

INTRODUCTION. The *Uniform Code of Military Justice* is now 15 years old. It has had time to be affected by the work of many persons and to achieve an institutionalized existence separate from its drafting and drafters. Nevertheless no one can fully understand as comprehensive an enactment as the Code without understanding the reasons giving rise to its enactment, and the problems which confronted those legislative midwives who drafted the legislation.

In the field of military justice there is a singular absence of material reflecting on these important matters. It is, therefore, appropriate that a decade and half after its enactment the facts concerning the drafting of the Code be preserved for the military law practitioner. No discussion of the drafting of the Code can fail to mention Professor Edmund M. Morgan who, more than any other individual, can be said to be its author. Personal tributes to this outstanding lawyer of necessity must be left to non-governmental publications, but for comprehension of the Code reference must be had to his background as a scholar, teacher and soldier, and the work he accomplished as Chairman of the Drafting Group,

This minor symposium is composed of three comments by uniquely qualified authors, followed by Professor Morgan's own evaluation of the origin of the Code written contemporaneously with the enactment of the Code. This evaluation has been augmented by editorial footnotes. The three other contributing authors are Professor Arthur E. Sutherland, Felix E. Larkin and Colonel Gilbert G. Ackroyd.

Professor Sutherland of Harvard Law School, who needs no introduction to American lawyers, contributes his insight into Professor Morgan's qualifications and personal experiences with military justice and traces the events that developed Professor Morgan's own philosophy of modern American Military Law, a philosophy which is mirrored in the Code and in the *Manual for Courts-Martial*. Felix E. Larkin was, at the time of the drafting of the Code, Assistant General Counsel, Department of Defense, and Assistant to Professor Morgan and the Drafting Committee. He relates the problems confronting the Committee and the manner in which these problems were overcome in the actual drafting.

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Colonel Gilbert G. Ackroyd, **JAGC**, was, after the drafting of the Code itself, the project officer for drafting the Evidence chapter of the *Manual for Courts-Martial, United States, 1951*. He relates his experiences in that capacity and describes the role played by Professor Morgan in this work.

With the publication of this Minor Symposium, the practitioners of military law will be able to develop a better understanding of the *Uniform Code of Military Justice* and its origin. It is hoped that with this understanding will come an increased capacity to cope with the problems of military justice and to contribute to the ever developing content of American military jurisprudence.

— Editor

EDMUND MORRIS MORGAN: LAWYER-PROFESSOR AND CITIZEN-SOLDIER.* Through all centuries men-at-arms have looked back on a past time, when “in the Old Army things were different.” And certainly the professional soldier in the last third of the 20th century faces a state of things vastly different from the life his ancestors knew in the professional armies of the mid-18th century. The military man can no longer think of himself as existing isolated, separate from the civilian society from which he differs as much in training, attitudes, traditions as in clothing. Today’s technology and international politics have altered the traditional difference between war and peace and between the concerns of the civilian and the concerns of the soldier. The civilian expert is respected and relied on by the military; the citizen respects the military man, and calls on him for many things not familiar to his military predecessors of past generations. Perhaps, whether we like it or not, we necessarily face a future in which war touches Everyman, and *mutatis mutandis* Everyman is at some time a soldier, and shares at many times a soldier’s perils.

When the *Military Law Review* presents a symposium on the drafting of the Uniform Code, it of necessity commemorates the work of Professor Edmund Morgan, one-time Lieutenant Colonel, Judge Advocate General’s Department, and much later the civilian expert who, more than any other one man, contributed to the drafting of the *Uniform Code of Military Justice*, and thus not only gives merited respect to a citizen-soldier who gave much to the well-being of today’s armed services, but also exemplifies the joint effort of the civilian and of the man-at-arms in today’s defense of this country.

Generations of American law students have known him as Eddie Morgan. They have admired the acuteness of his mind, and they have gained professional competence from his incisive classroom comments, and from his wise and learned writings. He was born in 1878, took a Bachelor’s Degree from Harvard College in 1902, earned its Master’s Degree in 1903, and became one of Harvard’s bachelors of laws in 1905. He began practice that year in Duluth, Minnesota; in 1912 he became a professor of law at that State’s University. In 1917 Yale persuaded him to join her Faculty of Law as a professor, but World War I deferred his instruction at Yale for two years. In September of 1917 he

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General’s School or any other governmental agency.

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was commissioned Major, Judge Advocate General's Department, O.R.C., and ordered to duty in Washington as assistant to The Judge Advocate General. His experience in that office gave him a deep grasp of all phases of military law and military justice. In July 1918 he was promoted Lieutenant Colonel, and he remained on active duty until the end of May 1919, when Yale was glad to welcome back the new professor. He continued his interest in military justice while he went on to establish a world-wide reputation as an expert on the law of evidence. Colonel Morgan continued to teach in New Haven until 1925, when Harvard invited him to return as a Professor to its Faculty of Law where twenty years earlier he had received his own training in his life-long profession.

In the summer and autumn of 1919 a Subcommittee of the United States Senate Committee on Military Affairs, then under the distinguished chairmanship of Senator James W. Wadsworth of New York, conducted a series of hearings on military justice. On the 18th of November 1919 Professor Morgan was called to testify. The Judge Advocate General's Corps officer of today will be principally interested in two features of Professor Morgan's testimony forty-five years ago. The first of these is his specific suggestion that the United States should establish a court of military appeals staffed with civilian judges, a proposal which of course, became part of the *Uniform Code of Military Justice* nearly a third of a century later. The second is his justification for this and for other proposed changes, a justification based on the nature of modern American armies. Colonel Morgan annexed to his testimony the text of an address he had made before the Maryland State Bar Association on June 26th, 1919, in which he reviewed the entire history of American military justice; he stressed the fact that under conditions of modern warfare, as he then saw it, armies must consist of great masses of young men, basically civilians, temporarily called into military service. He urged the necessity that under these circumstances, while adequate discipline must be certainly maintained, still the system of trial by court-martial and review of sentences must be such that an army so constituted, and the country which it serves, will have full confidence in the justice as well as the efficiency of the military establishment. Professor Morgan clearly foresaw, in 1919, the outlines of the system which he did so much to help construct in the *Uniform Code of Military Justice*, thirty years later.¹

¹ See *Hearings on S. 64 before a Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. (1919).

Professor Morgan is no narrow lawyer: he has taught many subjects — agency, contracts, pleading, damages, civil procedure, practice, evidence, military law, and torts. But, his principal energies always went into two of these — military law and evidence. Like any good soldier he has always been willing to serve where he was needed, no matter what the duty, and when drafted for administrative duties he performed them brilliantly. In 1936 when Roscoe Pound retired as Dean of the Harvard Law School Professor Morgan became acting Dean during the succeeding year until a permanent successor could be found. In 1938 Harvard selected him to occupy its oldest Chair of Law, the Royall Professorship, created in 1815.

During World War II, when the administration, faculty, and students of the Harvard Law School were under strong and proper personal and official pressure to go into some branch of government service, military or civilian, and when maintenance of the structure of that School became increasingly difficult, Harvard convinced Edmund Morgan that for the long pull, continuance of the successful operation of its Law School was of national importance, calling for him to remain at his post. For a second time it prevailed on him to accept the acting Deanship of the Faculty, which he held from 1942 until 1945. He then returned to his teaching and writing, only to have it again interrupted by a call to more public service.

In 1948 the Secretary of Defense asked him to be Chairman of a committee in the Secretary's office to draft the *Uniform Code of Military Justice*. It would be hard to overestimate his contribution to that remarkable legislation, establishing a common norm of fairness and firmness in the regulation of our armed services. Meantime Professor Morgan continued at Harvard teaching evidence until 1950, when he became Royall Professor of Law, Emeritus, and at the same time, at the age of 72, he became Vanderbilt University's Frank C. Rand Professor of Law.

Edmund Morgan's writings, both periodical essays and distinguished scholarly books, have been too numerous to review in this short notice.² Perhaps most indicative of his early and deep

² See, e.g., MORGAN, BASIC PROBLEMS OF EVIDENCE (1963); MORGAN, AN INTRODUCTION TO THE STUDY OF LAW (1948); MORGAN, PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION (1956); MORGAN AND JONGHIN, THE LEGACY OF SACCO AND VANZETTI (1948); MORGAN AND MA-GUIRE, CASES ON EVIDENCE (1942); WHITTIER AND MORGAN, CASES ON COMMON LAW PLEADING (1917); Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79 (1920); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L. J. 52 (1919).

commitment to problems of military justice is his 175-page mimeographed memorandum, *Notes on Military Law*, a comprehensive and scholarly survey of the whole subject, produced while he was on active duty in 1917–1919, and then circulated for the information of all officers of the Judge Advocate General's Department. He was Reporter for the American Law Institute *Model Code of Evidence*. He has served as a member of the Supreme Court's Advisory Committee on the Rules of Civil Procedure. As Directing Editor of the Foundation Press University Casebook Series, he has always been a sympathetic and encouraging friend to aspiring legal authors. One of those to whom Eddie Morgan thus gave early, welcome and much-needed help is particularly happy to be able to write these few words.

To all of us who have known Edmund Morgan—professional soldiers, lifetime civilians, or those who have for a time been citizen soldiers and always citizens interested in the military—the recollection of him is not alone of his high talent, of his dedication to scholarship and teaching, and of the patriotic impulse which has repeatedly turned him to the service of the United States. More than these things we shall all remember his great warmth of heart, and his capacity for lasting friendship.

ARTHUR E. SUTHERLAND*

* Bussey Professor of Law, Harvard Law School; A.B., 1922, Wesleyan; LL.B., 1925, Harvard; S.J.D., 1960, Suffolk; Member of the Bars of the States of Massachusetts and New York and of the United States Supreme Court; Major, Lt. Col., and Colonel, U.S. Army in U.S. and in European and Mediterranean Theaters, 1941–46.

DRAFTING OF CODE

PROFESSOR EDMUND M. MORGAN AND THE DRAFTING OF THE UNIFORM CODE.* The drafting of the *Uniform Code of Military Justice* was started in August 1948. The mammoth task was completed in February 1949. This was a remarkable achievement by any standard and will stand as a monument to the many people who participated in the work, but in particular it is a monument to Professor Edmund M. Morgan.

To appreciate Professor Morgan's contribution to the Uniform Code, it is necessary to go back in time to the end of World War II. The military forces of the United States had been increased to an unprecedented size by the introduction of millions of citizens. Few problems in the management of the Army and Navy were more difficult during World War II than the enforcement of the Articles of War and the Articles for the Government of the Navy. To balance the needs of discipline and to dispense justice was almost a hopeless task.

During the war, but particularly after the war, there was a great deal of criticism of the court-martial systems of both the Army and Navy. There were still large numbers of men in prison serving long sentences and many derogatory articles appeared in the press and in leading magazines. It was clear that many felt that the court-martial system was unfair and had been used more as an instrument of discipline than of justice. Some of these criticisms were justified and some were not. In all events, both the Secretary of the Navy and the Secretary of the Army established review boards to consider the sentences of the men who remained in prison.

The reviews resulted in the reduction of many sentences and the release from prison of a large number of men. Both the Army and Navy restudied their court-martial procedures and there was introduced into Congress amendments to both systems.

It was inevitable in this context that the establishment of the Department of Defense in 1947, designed to unify the Armed Services, would lead to a demand for the unification of the court-martial systems. This demand came from the Senate Armed Services Committee early in 1948. Secretary of Defense Forrestal was requested to submit a Uniform Code of Military Justice for the consideration of the Congress.

In addition to the criticism of the court-martial systems of both

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the Army and the Navy, it was felt there was no justification for two different systems of military justice. The Articles of War which governed the Army were quite different from the Articles for the Government of the Navy which applied to the Navy. There were differences in procedure and in substantive law. Inasmuch as the military establishment of the United States was now unified in one Department of Defense, it was felt that there should be a single law of military justice which would be applied to everyone serving in the Armed Services.

Pursuant, therefore, to the request of the Senate Armed Services Committee, Secretary of Defense Forrestal created a Committee to draft a Uniform Code of Military Justice. The Committee consisted of Under and Assistant Secretaries of the three military departments: Assistant Secretary Gordon Gray of the Army, Under Secretary John Kenney of the Navy, and Assistant Secretary Eugene Zuckert of the Air Force. On the advice of Assistant Secretary of Defense Marx Leva who had been a student of Professor Morgan's, Secretary Forrestal designated Professor Morgan to be Chairman of the Committee.¹

The task was indeed formidable. In addition to the criticisms leveled at the court-martial system during and after World War II, the Committee had to contend with criticisms that had stemmed from World War I. The subject of courts-martial had been one of heated controversy for generations. The problem itself was inherently difficult since military justice has always presented a large number of challenging problems. To achieve substantial justice of the type we would like to hope civilian courts dispense, within the disciplined ranks of a military establishment, seems at times to be an impossibility.

The sheer physical job of trying to standardize into a single code the Articles of War and the Articles for the Government of Navy was staggering in itself. Each system differed from the other in origin and in concept.

The Committee addressed itself to the task by forming a working group of staff officers from each service. In addition to the group, a Research Group from the Office of the Secretary of Defense was established. The only way we felt we could approach the problem was to compile a full comparative study of both systems.

Comparison was made in the following way: The Articles of War were used as the base. We copied Article of War No. I and

¹ For a list of committee staff personnel, see Appendix, *infra* pp. 12-13.

then searched through the Articles for the Government of the Navy for the comparable subject matter. We then copied this Article and added to this subject matter the interpretation of the Article as shown in the *Manual for Courts-Martial* and in other sources when necessary for purposes of clarity. We also included in this section the interpretation of the Navy Article as shown in *Naval Courts and Boards*.

The paper then compared the differences which existed between the Army and Navy practices and finally it contained the recommendations and criticisms drawn from many studies and reports on military justice and, in some cases, from the various hearings that had been held in the Congress.

Since there were **121** Articles of War, we prepared **121** position papers.

Having these comparative studies in hand, we then prepared an outline for the new Uniform Code of Military Justice. We prepared it on what we thought was a logical basis without reference to the Articles of War or the Articles for the Government of the Navy.

Having agreed upon a table of contents for the new Uniform Code, we undertook to agree upon each section of the new Code after a thorough study of our comparative material and, of course, after much argument and discussion.

Since this whole job was not unlike a codification of the laws of ancient Rome with the Napoleonic code, it is quite understandable that there would be many differences of opinion and much difficulty in arriving at-agreement.

This was recognized as a possible problem from the beginning. We have all experienced the fate of governmental studies and the reports of special committees. The usual result is that after a committee has worked hard and long on a difficult subject and has rendered its report, the report is sent for comment to the appropriate governmental departments that are involved. The comments and criticisms and subsequent analysis either delay the implementation of the report for an interminable period or the report is quietly filed away never to be seen again. To overcome this possibility, Secretary Forrestal decided that when the representatives of the three military services and the representatives of his office were in agreement, such portions of the report would be final and would not be sent back to the military departments for further study or comment. This, of course, put a premium on intensive study in the beginning and full discussion before

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agreement was given. It was in this area that Professor Morgan made such an outstanding contribution. By the time the Committee submitted its report to Secretary Forrestal there were only a half a dozen individual items that were not agreed upon. After Secretary Forrestal quickly made the decisions on these items there was in being a Uniform Code of Military Justice.

Although Professor Morgan had served in the Office of the Judge Advocate General of the Army in World War I, he had not been concerned with problems of military law for some twenty-five years. His ability to master the whole complex and technical subject of military law was a revelation. As Chairman of the Committee his erudition, and his amazing fund of legal knowledge, was smoothly and quickly translated into the most practical solutions. The reasons for his national reputation for scholarship and teaching excellence became quickly evident. All the tools of the teaching Professor were natural and useful in his hands when used in conferences which brought together people representing strong conflicting viewpoints. He cajoled, he persuaded, he convinced. He listened, he was convinced, he changed his mind. We saw the same brilliance that Professor Morgan had displayed in the classroom and in his specialty, the field of evidence, applied in an important and highly specialized field of law.

On a subject on which honest men differ he achieved a remarkable unanimity of opinion among the Committee members and together they produced the *Uniform Code of Military Justice*.

The last chapter in the work of the *Uniform Code of Military Justice* was its submission to Congress and its final enactment into the law. Here again, we 'did some innovating for our presentation to Congress. We prepared the statute in the form of an annotated statute. The draft of the new law sent to Congress contained each provision, a reference note explaining the source of the provision, and where it was previously found in either the Articles of War or in the Articles for the Government of the Navy. A commentary and an explanation of each provision was also supplied. This was a rather original and unique way of presenting new legislation to the Congress but it served its purpose since it assisted the Congressional Committee in more readily understanding the basis of the new statute and the purpose it was trying to achieve.

Here again Professor Morgan participated with great distinction. He was the first witness before the House and Senate

Committees and his clear and forceful explanations did much to assist the Committees in understanding the new law.

With very few changes but after long and intensive hearings the Bill was finally passed by both Houses of Congress. A very difficult job had been accomplished in record time.

FELIX E. LARKIN*

* Executive Vice President and Director, W. R. Grace & Co. Formerly General Counsel of the Department of Defense (1949–1951). A.B., 1931, Fordham University; M.B.X., 1933, New York University; LL.B., 1942, St. John's University; Member of the Bars of the State of New York and of the United States Supreme Court.

APPENDIX STAFF OF THE DRAFTING COMMITTEE

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PROFESSOR MORGAN AND THE DRAFTING OF THE MANUAL FOR COURTS-MARTIAL.* The passage of the *Uniform Code of Military Justice* by Congress and its approval by the President on May 5, 1950, did not complete the work of creating a uniform military justice system for the armed forces. Article 36 of the Code required the President to lay down procedural rules and modes, of proof for the unified court-martial system, and Article 56 authorized the President to establish maximum punishments for non-capital offenses. In addition, it would be necessary to supplement and explain the complex provisions of the new Code, and for these purposes the first uniform Manual for Courts-Martial, applicable to all the armed forces,' would have to be drafted for promulgation by the President. Further, section five of the enacting statute' provided that the Code was to become effective on the last day of the twelfth month after approval, which **was** May 31, 1951. Consequently, an interservice committee was formed which had the assignment of preparing as rapidly as possible the Presidential Executive Order which later became known as the *Manual for Courts-Martial, United States, 1951*.³ Professor Morgan was, of course, interested in the drafting of the Manual and was consulted on this work by the Defense Department.

Professor Morgan, at this time, had retired from active teaching at Harvard Law School and had become Frank C. Rand Professor of Law at Vanderbilt University. He had already begun his own draft of the Evidence chapter of the Manual which, of course, was his field of specialty when he was consulted by the Defense Department. A service draft of the same chapter had been completed, which, after the usual changes and accommodations resulting from interservice committee meetings, had been approved by the three services.

Professor Morgan forwarded his draft to the Department of Defense where it was compared with the draft prepared by the services. Although the comparison indicated few differences in substance, nevertheless, in view of Professor Morgan's national reputation in the field of evidence it was the opinion of the General Counsel's Office, Department of Defense, that representatives

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

'Previously each service had its own manual.

² Act of May 5, 1950, 64 Stat. 108 (1950). The Code is now codified as Chapter 47 of Title 10, U.S.C. 10 U.S.C. §§ 801-940 (Supp. V 1963).

³ Executive Order No. 10214 (Feb. 8, 1951).

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of the department should meet personally with Professor Morgan to obtain his comments and assistance. As a result, together with Mr. Haydock' from the General Counsel's Office, I visited Professor Morgan at Vanderbilt University for the purpose of discussing the chapter on evidence with him.

For two days we sat in Professor Morgan's study at Vanderbilt going over what was to be the new Evidence chapter⁵ on practically a line-by-line basis. Professor Morgan's great experience in the field was invaluable and many of his comments found their way into the new rules of evidence which were to govern criminal trials in the armed services for many years to come. During this conference Professor Morgan recounted many of the experiences of his early days, both in and out of the teaching profession. Few people could have had an opportunity for such an intense and concentrated confrontation with one of the country's most outstanding professors of law, and this is his chosen field of expertise.

Thus, not only the Uniform Code, but also the *Manual for Courts-Martial*, reflects the influence of Professor Edmund M. Morgan. Nor could it have been otherwise. It would have been unthinkable for the chief author of the Code not to have contributed to the new system in the area of its procedural implementation which was assigned by the Code primarily to the Manual.

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⁶ **MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951** Ch. XXVII, *Rules of Evidence*.

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THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE*

By EDMUND M. MORGAN**

The Articles of War and the Articles for the Government of the Navy have always constituted the code of criminal law and criminal procedure for the Armed Forces. In contrast to the law governing civilians, the punishments impossible are not specified in the Code but are left to be fixed by the military authorities, except that the later codes do not authorize punishment by death save for specifically designated offenses. The system also provides for summary punishment for minor infractions and a series of courts—a general court having power to try all offenses, a special court with limited power to impose punishment and a so-called summary or deck court with very limited powers. Unlike the civilian courts, each of which has a permanent judge or group of judges, the court-martial is appointed by military authorities to try a designated case or series of cases. In this respect it resembles the civilian jury rather than the civilian court, but its members under the orthodox system perform the functions of both judge and jury in determining guilt and fixing sentences.

When Thomas Jefferson and John Adams were made members of a committee to revise the military code of 1775, Adams records: "There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the

* This article is reprinted with permission from the *Vanderbilt Law Review*. See 6 VAND. L. REV. 169 (1953). The original substantive footnotes, edited to conform to *Military Law Review* citation style, are numbered. Editorial footnotes are lettered. The opinions and conclusions presented herein (except for the editorial footnotes) are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. The editorial footnotes represent the opinion of an individual specialist in military law and do not necessarily represent official governmental policy or position.

The substance of this article was given in an address to the 1951 annual meeting of Phi Beta Kappa at the University of Kentucky.

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British, for the British Articles of War were only a literal translation of the Roman. . . . I was therefore for reporting the British articles *totidem verbis*. . . . The British articles were accordingly reported.” These were adopted in 1776 and subsequent legislation made no fundamental change. Even the Articles enacted in 1916 were only a rearrangement and reclassification without much alteration in substance.*

The early American Naval Articles were also the **work** of John Adams and were largely the British Naval Articles of 1749.³ The Articles for the Government of the Navy, enacted in 1862 and amended on half a dozen occasions, were originally and continued to be in theory and substance fundamentally the British articles.

The theory of the military establishment had been, during World War I was, and, if the conservatives of the regular service had their way, would still be that courts-martial “are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.”⁴ This means that the finding and sentence of a court-martial constitute only advice to the commanding officer as to what should be done to an accused for an alleged offense, and that the entire machinery for review by higher authority is set up merely to furnish trustworthy advice to the commander-in-chief or the officer to whom he has delegated the disciplinary function. This concept is based upon military history and particularly upon a decision of the Supreme Court in 1857 to the effect that courts-martial are established not under the judiciary Article III of the Constitution, but under Article II which makes the President commander-in-chief and Article I which gives Congress power to make rules for the government of the land and naval forces.: The militarists neglect the implications of a pronouncement of the same Court thirty years later:

The whole proceeding from its inception is judicial. The trial, findings, and sentence are the solemn acts of a court organized and conducted under the authority of 2nd according to the prescribed forms of law.

¹ 3 ADAMS, WORKS OF JOHN ADAMS 93 (1850).

² Gen. E. H. Crowder in *Hearings before Committee on Military Affairs on H.R. 23628*, 62d Cong., 2d Sess. 16 (1912). For a description of the principal changes, see **A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY AND OTHER PROCEDURE UNDER MILITARY LAW IX-XIV** (1916).

³ See 96 CONG. REC. 1381 (1950) for Senator Kefauver's brief history of legislation prior to the Elston Act.

⁴ 1 WINTHROP, MILITARY LAW 53 (1886).

⁵ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

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It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*.⁶

The provisions for review as contained in the 1916 revision of the Articles of War reflect the military theory. No sentence or finding of a court-martial could be put into effect until approved by the authority which appointed the court. The power to approve included the power to disapprove and to send back to the court a finding of not guilty or a sentence deemed too lenient. Confirmation of the action of the appointing authority by the President was required where the sentence affected a general officer, or included dismissal of an officer, death, or dishonorable discharge, except that in time of war a sentence of dismissal, or a sentence of death for murder, rape, mutiny, desertion, or spying could be approved or confirmed by the commanding officer in the field. And the officer competent to order execution of such sentence of death or dismissal could suspend sentence until the pleasure of the President was known.

It will be observed that there was no requirement of participation in the process of review by any legal officer. In practice the appointing authority was advised by a judge advocate as was the President, whose adviser was the Judge Advocate General. Section 1199 of the United States Revised Statutes of 1878 provided that "the Judge Advocate General shall receive, revise and cause to be recorded the proceedings of all courts martial, courts of inquiry and military commissions." The legislative history of this act furnishes good grounds for arguing that the Bureau of Military Justice, which was later merged in the Judge Advocate General's Department, was intended to be a court of military appeals with power in the Judge Advocate General to reverse or modify the findings and sentence of courts-martial for errors of law.⁷ But from the outset, the War Department interpreted the statute as conferring the power only to advise upon matters of substance and the power to correct only mere clerical errors. In 1918 General Samuel T. Ansell challenged this interpretation and thereby came into sharp conflict with the Chief of Staff. The controversy was

⁶ *Runkle v. United States*, 122 U.S. 543, 558 (1887).

⁷ See brief of Col. Eugene Wambaugh (Professor of Law at Harvard University) in *Hearings before a Subcommittee of the Senate Committee on Military Affairs on S. 64*, 66th Cong., 1st Sess. 86-88 (1919). This is a lengthy report giving verbatim the testimony taken on Ansell's proposed bill, usually called the Chamberlain Bill.

submitted to Secretary Baker, who after consideration of the conflicting arguments, sustained the War Department interpretation.⁸

The *Tapalina* case⁹ is a striking example of what could and sometimes did happen under this regime. Tapalina, a military policeman charged with burglary, was found not guilty by a general court-martial. The appointing authority sent the case back for revision with a communication which amounted to an argument that the evidence warranted a finding of guilty. The court on revision found the accused guilty. The sentence was dishonorable discharge and five years confinement in the penitentiary. The reviewing officer in the Judge Advocate General's office wrote: "After a careful consideration of the evidence this office is firmly convinced of the absolute innocence of the accused. The evidence against him is wholly inconclusive, and his statements have a ring of sincerity which convinces the reader that he speaks the truth." This was sent to the appointing authority for his consideration, with a reminder that the guilt of an accused must be established beyond reasonable doubt, that the Judge Advocate General's office had grave doubts of Tapalina's guilt and that the court's first finding showed that it shared this doubt. Nevertheless, the appointing authority approved the conviction. This was publicly justified in 1919 by General Crowder in an official publication.¹⁰ "But on February 12, 1919, upon an application for clemency for Tapalina, General Crowder made the following indorsement:

While it cannot be said that there is no evidence upon which the findings of guilty can be based, this office is strongly of the opinion that an injustice may have been done to this man, and that it should be righted as far as possible. It will be noted that Mr. Flagler, field director of the Red Cross at Camp Gordon, comments upon the poor reputation of one of the principal witnesses against Tapalina. It is recommended that the unexecuted portion of the sentence in this case be remitted, and that the prisoner be released from confinement and restored to duty upon his written application to that end."

Shortly after the armistice of November 11, 1918, the controversy between General Ansell and the Chief of Staff broke into the open. Ansell's vigorous protests within the Department as well as public reaction brought directives in the form of amendments to the Court-Martial Manual which corrected some of the most flagrant defects to the system. Secretary Baker, in an attempt to

⁸ *Hearings*, *supra* note 7, at 90-91.

⁹ See Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 *YALE L. J.* 52, 64 n. 43 (1919).

¹⁰ *MILITARY JUSTICE DURING THE WAR* 9, 10 (Government Printing Office 1919).

¹¹ *Note* 9 *supra*.

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render Ansell harmless, detailed him to draft a revision of the Articles of War. His draft was introduced in the Senate by Senator Chamberlain and in the House by Congressman Royal Johnson, but not at the request or with the sanction of the War Department, which in fact strongly opposed most of the provisions. Ansell's public condemnation of the system and the complaints by service men and their families led to the appointment of a clemency committee in the office of the Judge Advocate General of which Ansell was at first chairman, and to an investigation by a committee of the American Bar Association and others. Extensive hearings were held on the Chamberlain Bill. The Ansell draft was badly mutilated but the substance of some of its provisions protecting the rights of an accused were embodied in the Act of June 4, 1920, which, without further amendment of any importance, was in force during World War II.

While all this was agitating the Army, the Navy was doing almost nothing to improve its antiquated system. During World War I, it was the boast of the Naval Judge Advocate General office that it had no lawyer on its staff. But during World War II the Navy found much use for legally trained men in a number of its departments and some use for them in the office of its Judge Advocate General. And in that war there were in the naval service so many more men, and the Navy was relatively so much more active and important, than in World War I that its administration of military justice could not escape public attention. This was doubly or trebly true of the Army with its puzzling policy as to public relations concerning its treatment of military offenders. In some instances it actually promoted publicity of convictions in the communities in which the accused had lived and was well-known. Furthermore its officers who appointed courts-martial and defense counsel failed to recognize that in many of its courts-martial they were lawyers, men who were trained to fight for the rights of an accused and who resented any attempt to influence their action as counsel and who condemned any effort to control a court as poisoning the very source of justice.

The result was a much louder public clamor and a series of investigations and reports by committees of civilians, sponsored by the Army and the Navy, as well as a review of cases of men still serving sentences. Proposed Articles of War were drafted and submitted by representatives of the Army and proposed Articles for the Government of the Navy by representatives of the Navy. On the former, hearings were had and a proposed act differing widely from that submitted was whipped into form. As to the Navy pro-

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posals, hearings were delayed. There seems to have been some sort of agreement that nothing should be submitted to the 80th Congress, because the problems of both services should be considered together. But the Elston bill was unexpectedly offered as an amendment to the National Defense Act and was enacted by both Houses. To what extent it applied to the Air Force, which then had become a separate service, was debatable, but the question was never raised calling for official decision. Before this act went into effect and while the Articles for the Government of the Navy and the Disciplinary Laws of the Coast Guard remained as they had been during World War 11, Secretary Forrestal appointed a committee to draft a Uniform Code of Military Justice designed to govern all branches of the service.

The Forrestal Committee had as executive secretary Mr. Felix E. Larkin, then Assistant General Counsel of the Secretary of Defense, who headed a working staff of 15 lawyers composed of officers and representatives of the Army, Navy, Marine Corps and Coast Guard, including five civilian lawyers. This staff processed all material, and the committee worked over every provision in detail. The Code, as the Committee reported to the Secretary, is a result of intensive study of (1) the law and practices of the several branches of the service, (2) the complaints made against the structure and operation of the military tribunals, (3) the explanations and answers of representatives of the services to these complaints, (4) the various suggestions made by organizations and individuals for modification or reform, and the arguments of the services as to the practicability of each, and (5) some of the provisions of foreign military establishments and their application in pertinent situations. The Committee endeavored to follow the directive of Secretary Forrestal to frame a Code that would be uniform in terms and in operation and that would provide full protection of the rights of persons subject to the Code without undue interference with appropriate military discipline and the exercise of appropriate military functions. This meant complete repudiation of a system of military justice conceived of as only an instrumentality of command; on the other hand, it negated a system designed to be administered as the criminal law is administered in a civilian criminal court. The Code contains all the criminal law and procedure governing the Army, Navy, Air Force and Coast Guard both in time of peace and in time of war.

No one, and least of all any member of the Forrestal Committee, will contend that the Code provides the ultimate solution of the problem inherent in the situation where the acknowledged military

necessity of providing effective means of enforcing discipline meets head on the generally accepted opinion of the American people as to the rights of every person accused of crime. As a basis for reaching a fair judgment concerning the merits and demerits of the Code and the utility of continued study, it may be helpful to consider the proposals for reform in the Army system made by General Ansell in 1919 and to observe the extent to which his ideas have been made effective by legislation culminating in the Code.

1. The usual criminal code defines or describes the prohibited conduct and fixes the penalty for each offense within specified limits. The sentencing power is usually in the judge but sometimes is conferred upon the jury. In military codes the offenses often are more generally defined and each carries such penalty as the court-martial may in its discretion impose, except that in time of peace the President may prescribe maximum punishments for other than capital offenses. Ansell proposed that the offenses be more specifically defined and a definite maximum penalty be set for each offense. None of the subsequent legislation has adopted this proposal as to penalties. The Act of 1920 expanded the power of the President to prescribe maximum penalties by making it applicable in time of war as well as in time of peace. The Uniform Code provides generally that the punishment which a court-martial may direct for an offense shall not exceed the limit prescribed by the President for that offense. It does define offenses. In fact it rearranges the punitive articles and redrafts them so as to conform in language and substance with modern penal legislation. Thus in some respects the Code goes well beyond Ansell's objectives, but it does not meet his demand for specified and limited penalties.

2. Before 1920 the general court-martial was composed of not less than 5 or more than 13 officers; the special court of not less than 3 or more than 5 officers and the summary court of one officer. Ansell would have fixed the general court at eight and the special at three. No subsequent legislation has adopted this proposal. The Uniform Code prescribes only the minimum number of members for general and special courts.

In this connection it is necessary to consider a custom of the service which was neither authorized nor prohibited by the Articles of War. It goes without saying that no judge or other official can during a trial change the composition of a civilian jury by excusing some of its members and replacing them with others, unless the parties expressly consent; nor can a defendant be required to proceed with less than the constitutional number. In the service the convening authority of a court-martial is em-

powered to relieve a member of a general or special court during the trial so long as the membership is not reduced below the required minimum and to add new members up to the allowable maximum. Ansell's proposal did not affect this custom. Merely fixing the number of members would not have prevented change of membership, but it would have made it more difficult; and if Ansell's methods of selecting members of the court had been adopted, this custom of the service would have been almost, if not quite, useless as a device for command control of the court. The Uniform Code in Article 29 provides that no member of a general or special court shall be absent or excused after arraignment of the accused except for physical disability or as a result of a challenge or by order of the convening authority for good cause.

It permits the adding of members and prescribes the procedure in general and special courts whose membership has been reduced below the minimum and to which new members have been added. This article recognizes the military necessity of transferring officers from court-martial duties to other functions in unusual situations. Assuming honest administration, it is a wise provision; but it must be conceded that it carries risk of abuse. If the Code were applicable only in peace time, this article could hardly be justified."

3. Though before 1920 no Article of War required an investigation of charges duly preferred against an accused, the *Court-Martial Manual* directed the officer exercising summary court-martial jurisdiction to investigate the charges carefully before forwarding them to superior authority and to give the accused an opportunity to make a statement and to offer evidence and any matter in extenuation. Ansell proposed that the investigation and report be made mandatory by statute and that no charge should be referred for trial unless an officer of the Judge Advocate General's Department certified in writing upon the charge (1) that a punishable offense was charged with legal sufficiency against the accused and (2) that it had been made apparent to him that there existed prima facie proof of accused's guilt.

The Act of 1920 in Article 70 forbade reference to a general court for trial until after a thorough and impartial investigation, at which accused should be given an opportunity to cross-examine any available witnesses against him and to offer evidence, and the

^a *Editor*.—The limitations on excusing court members have been judicially applied to the adding of members by the convening authority. See *United States v. Whitley*, 5 U.S.C.M.A. 786, 19 C.M.R. 82 (1955). The "good cause" required must now be affirmatively shown in the record. See *United States v. Greenwell*, 12 U.S.C.M.A. 560, 31 C.M.R. 146 (1961).

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investigating officer was bound to examine available witnesses requested by the accused. The Elston Act added the requirement that upon request the accused be represented by counsel. The Uniform Code adopts the Elston Act provision. A violation of the Article is, of course, ground for reversal by superior authority, but it does not deprive the military court of jurisdiction so as to enable the accused to secure a writ of habeas corpus from a civilian court. Thus the Ansell proposal as to preliminary investigation has been accepted and strengthened.

The Elston Act and the Uniform Code impose upon the convening authority the duty of submitting the charges to his staff judge advocate before ordering a trial, and provides that he shall not refer a charge to a general court for trial "unless it has been found that the charge alleges an offense and is warranted by evidence indicated in the report of investigation." This is designed to accomplish the purpose of Ansell's article; but it is weaker. It is somewhat strengthened by the provision of the *Court-Martial Manual* that the opinion of the Judge Advocate will accompany the charges if they are referred for trial, but the decision lies not with a legal officer but with the convening authority.

4. Ansell's plan for the selection of the personnel of court and counsel and for the exercise of their respective functions called for startling changes:

a. It made an enlisted man competent to serve as a member of a general or special court-martial. If the accused was a private on trial before a general court, three of the eight members must be privates; if on trial before a special court, one of the three members must be a private. When the accused was a noncommissioned officer, the court must have a like proportion of noncommissioned officers as members.

Both the Elston Act and the Uniform Code provide that when an enlisted man is the accused before a general or special court he is entitled to have at least one-third of the membership of the court enlisted personnel chosen from a unit other than his own. This is only when he makes an appropriate written request. Since noncommissioned officers are enlisted personnel they may be selected for the trial of privates. And it seems to be the practice for the appointing authority always to select them.^b Reported experience shows this provision has not worked to the benefit of the soldier.

^b Editor.—The Court of Military Appeals has apparently approved the practice of selecting only senior grade noncommissioned officers for all trials in which enlisted members of court are requested. See *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

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Whether, and to what extent Ansell's proposal would have been better is debatable. Incidentally, it should be noted that prior to and during World War I the members of the court in closed session determined the guilt or innocence of the accused by oral vote after discussion. The vote was taken in inverse order of the rank of the members. But this' did not serve to protect junior officers from the overpowering influence of their superiors. Ansell's draft did not change this. The 1920 Act and all subsequent legislation required the vote to be by secret written ballot.

b. Ansell would have required concurrence of three-quarters of the members of a general court for condiction of any offense, and a unanimous court for imposition of the death penalty. It will be noted that where enlisted men were on trial, the enlisted personnel had power to prevent a conviction. The 1920 Act provided that for a conviction of an offense carrying a mandatory death penalty or for any sentence of death, a unanimous vote ~~was~~ requisite; for imprisonment for life or more than ten years, the concurrence of three-quarters of the members, and for other convictions and sentences, concurrence of two-thirds of the members. ~~This~~ provision is continued in the Elston Act and the Uniform Code.

c. Under Ansell's Article 12 the convening authority must appoint for each general and special court an officer called, the Court Judge Advocate who must be either an officer of the Judge Advocate General's Department, if available, or, if such a one is unavailable, an officer recommended by the Judge Advocate General ~~as~~ specially qualified by reason of legal learning and experience. ~~The court~~ judge advocate would perform all the functions of a judge in a civilian criminal trial, including the duty to see to it that the rights of the accused were properly protected and for that purpose to call and examine witnesses. He would rule upon all motions and all questions properly presented, and in case of conviction would pronounce sentence. He was not a member of the court but must sit with it in all open sessions.

For each general or special court the appointing authority would choose a panel of fair and impartial members, from which the court judge advocate would select and organize the court.

No subsequent legislation has gone so far. The 1920 Act provided that the appointing authority of a general court should detail ~~as~~ a law member of the court an officer of the Judge Advocate General's Department if available, otherwise an officer selected as specially qualified for that position. He ruled upon all interlocutory questions, but his rulings were final only upon objections to the

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admissibility of evidence. On all other matters such as competency of witnesses, order of presenting evidence and conduct of counsel, his rulings were subject to be overruled by a majority of the members of the court in closed session. He was also required to instruct the court concerning the presumption of accused's innocence and the burden of the prosecution to prove guilt beyond reasonable doubt. The Elston Act prescribed the qualifications of the law member. He must be a member of the Judge Advocate General's Department, or an officer who is a member of the bar of a court of the United States or of the highest court of a state. It allowed the appointing authority no discretion to appoint a nonlawyer as "specially qualified." It increased his powers and duties by making his rulings final except on a motion for a finding of not guilty or on a question of accused's sanity. The court alone ruled on challenges. The Uniform Code substitutes a law officer for the law member, and puts him in the position of a trial judge. He is not a member of the court, does not retire with the court during its deliberations and has no vote on conviction or sentence. He must instruct the court as to the elements of the offense charged, the presumption of accused's innocence and the burden of proof. Obviously we are still a long way from Ansell's plan. The court is still selected by the convening authority as is the law officer,^c but an unqualified officer cannot function because the appointing authority finds no one available who has the prescribed qualifications.

d. Ansell's plan imposed upon the appointing authority the duty to assign to accused military counsel of accused's choice, unless the appointing authority furnished the court a certificate to be placed in the record that the officer or soldier chosen by the accused could not be assigned without serious injury to the service for reasons set forth in the certificate. And if the accused con-

^c Editor.—The Army has since established a full-time trial judiciary as a separate organization to increase the independence and expertise of law officers. These law officers are not under the command of convening authorities but on loan from the U.S. Army Judiciary, a separate Class II activity. See **U.S. DEP'T OF ARMY, JAGO MEM. NO. 10-4, THE U.S. ARMY JUDICIARY** (27 Nov 62); Army Regs. No. 22-8 (14 Oct 64). See also Meagher and Mummey, *Judges in Uniform; an Independent Judiciary for the Army*, 44 J. AM. JUD. SOC'Y 46 (1960); Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960). Further, the Court of Military Appeals has announced its aim "to assimilate the status of the law officer, wherever possible, to that of a civilian judge of the Federal system." See *United States v. Biesak*, 3 U.S.C.M.A. 714, 722, 14 C.M.R. 132, 140 (1954); cf. *United States v. Keith*, 1 U.S.C.M.A. 493, 4 C.M.R. 85 (1952). The court has enthusiastically furthered this policy. See Miller, *Who Made the Law Officer a "Federal Judge"?*, 4 MIL. L. REV. 39 (1959); Snyder, *Evolution of the Military "Judge"*, 14 S.C.L.Q. 381 (1962).

vinced the court judge advocate that he needed civilian counsel and was without the necessary means to procure counsel, the court judge advocate must retain such counsel for him.

The 1920 Act required the appointing authority of a general or special court to appoint counsel for the accused. The Elston Act added that such counsel, as well as counsel for the prosecution, must, if available, be an officer of the Judge Advocate General's Department or a member of the bar of a federal court or of the highest court of a state; and in all cases where the prosecuting judge advocate has such qualifications, defense counsel must also have them. The Uniform Code prescribed the same qualifications for counsel of a general court but makes them mandatory. That weasel phrase, "if convenient," is eliminated. Thus a general court is presided over by a qualified lawyer and both prosecution and defense are represented by qualified lawyers. Of course, the accused can employ civilian counsel at his own expense, but there is no provision for furnishing civilian counsel at government expense.

For a special court no law officer is provided; and as to counsel, the provision of the Elston Act that the qualifications of defense counsel shall equal those of counsel for the prosecution is retained.^d

e. Ansell would have made provision for attacking the entire panel of court members by a proceeding somewhat similar to a challenge to the array or panel in a civilian court, based on prejudice of the appointing authority or defects in the constitution or composition of the court which would hinder a fair trial; and would have given the accused two peremptory challenges to individual members of the court as well as retained his right to challenge any member for cause. He would also have made the trial judge advocate subject to be disqualified by affidavit of prejudice. The Act of 1920, the Elston Act and the Uniform Code give one peremptory challenge to each side. There is no challenge to the panel and the law officer is subject to challenge only for cause.

Insofar as the general court is concerned, the mandatory qualifications of the law officer and counsel will make for a more efficient trial than those of the Ansell articles but the protections of the accused against unfair action of the appointing authority

^d *Editor.*—In a special court-martial, if the trial counsel is not a lawyer, a non-lawyer defense counsel may be appointed and this does not violate the U.S. Constitution. See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963). However, the Army does not permit the taking of verbatim transcripts in trials by special court-martial, and has thereby precluded such courts from awarding punitive discharges. Compare Army Regs. No. 22-145 (13 Feb 1957), with UNIFORM CODE OF MILITARY JUSTICE Art. 19.

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are not nearly 'so adequate. And many of the pre-existing alleged deficiencies in the administration of special courts have not been eliminated.

5. Even more radical were Ansell's proposals for proceedings after trial. When an accused is convicted in an American civilian court, he may in modern times move for a new trial before the trial court and he may appeal to a higher court, which ordinarily will review the case for errors of law. By making this appeal, he waives his constitutional right not to be twice tried for the same offense. He must bear the expense of preparation of the record for the appeal and must be responsible for the fees of his counsel. Provision is made for furnishing him trial and appellate counsel and for producing a record on appeal at government expense only in case he is indigent; and then the choice of counsel lies with the court. In the services, the findings and sentence of a general or special court-martial are not final until acted upon by superior military authority. The usual course is for the record to go on to the authority convening the court for approval, disapproval or modification. In addition, certain sentences require confirmation by the President. The power of the convening authority to disapprove enabled him to send back to the court for reconsideration a finding of not guilty and a sentence which he considered inadequate. Of course, he could disapprove the whole proceeding and order the accused restored to duty. The Ansell Articles abolished this system.

a. They specifically forbade reconsideration of a finding of not guilty, or the imposition of a sentence more severe than that originally pronounced unless the greater sentence was mandatory by statute. There was no review by the appointing or convening authority but he was given power to mitigate, remit or suspend any sentence not extending to death or dismissal.

b. They set up a Court of Military Appeals consisting of three judges to be appointed by the President with the advice and consent of the Senate, each to hold office during good behavior and to have the pay and retirement pay of a circuit judge of the United States. The Court, for convenience of administration only, was to be located in the office of the Judge Advocate General Department. There was no express provision that its members be civilians, though that was probably contemplated. The court was to review every case of a general court in which the sentence involved death, dismissal or dishonorable discharge or confinement for more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the rights of the

accused without regard to whether the errors were made the subject of objection or exception at the trial. The accused could prevent review by stating in open court when sentence was pronounced that he did not wish his case reviewed by the Court of Military Appeals.

The Court was to have power to disapprove a finding of guilty and approve only so much of it as involved a finding of guilty of a lesser included offense, and to disapprove the whole or any part of a sentence. It was to advise the appropriate convening or affirming authority of the proper action to take, including the ordering of a new trial, and to report to the Secretary of War for transmission to the President recommendations of clemency.

Review of cases by special or summary court by a judge advocate was provided.

The Act of 1920 rejected this proposal *in toto*. It continued the initial review by the convening authority, as the Elston Act did and as the Uniform Code does. The latter two permit him to take action for accused's benefit but not to his detriment. As an administrative device Ansell, while Acting Judge Advocate General, had set up in the office a Board of Review consisting of three officers. They reviewed all records in due course and wrote opinions and recommendations for signature of the Judge Advocate General, who might accept, reject or modify them before transmission to the proper military authority or the Secretary of War. The Act of 1920 provided that the Judge Advocate General should set up in his office a Board of Review consisting of three or more officers.

(1) The Board was to review the records of all trials in which the sentences imposed required confirmation by the President and submit its opinion to the Judge Advocate General, who was to transmit it with his recommendations directly to the Secretary of War for action by the President. The Judge Advocate General might disagree with the Board. The whole communication was only advisory. The President might or might not follow the recommendation of the Board or the Judge Advocate General, and in fact he would ordinarily have and act upon the advice of the Secretary of War, who had in all probability consulted the Chief of Staff or his representatives. (2) Where the sentence of a general court in a case not requiring confirmation by the President involved death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, the Board had to review the record and if it, with the approval of the Judge Advocate General, held it legally sufficient, the Judge Advocate General so advised the reviewing or confirming authority that had submitted the record, who might then order execution of the sentence.

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If the Board and the Judge Advocate General agreed that errors of law had been committed, injuriously affecting the substantial rights of the accused, the Judge Advocate General was to transmit the record through military channels to the convening authority for appropriate action. If the Judge Advocate General did not concur with the Board, he was to send all papers in the case, including the opinion of the Board of Review and his own dissent, to the Secretary of War for action of the President. Thus the Judge Advocate General retained the power to make the decision or opinion of the Board merely advisory. And in some notable cases during World War II his opinion prevailed over that of the Board.

All other records of trial by general court were to be examined in the Judge Advocate General's office. If the examining officer found the record legally insufficient, the record went to the Board and if it agreed, the procedure thereafter was that for cases requiring confirmation by the President. Provision was made for more than one Board of Review when needed and for such boards in duly authorized branch offices.

The Elston Act made more elaborate provisions for review. It set up in the Judge Advocate General office a Judicial Council composed of three general grade Judge Advocate General officers, and a Board of Review composed of three Judge Advocate General officers. It provided for confirmation of some sentences by the President, of some by the Secretary of the Army and of some by the Judicial Council with the concurrence of the Judge Advocate General. As to each of these, the power of the Board and of the Judicial Council and the procedure for review varied. The Judge Advocate General's nonconcurrence with the Board or Judicial Council required reference to higher authority. It would not be profitable to go into detail. It is sufficient to state the system within the office was elaborate and the control by military officers was almost complete.

Prior legislation had confined the power of review to consideration of errors of law. The Elston Act authorized both the Board of Review and the Judicial Council to consider both law and fact, to weigh evidence, judge the credibility of witnesses and determine controverted questions of fact.

These provisions for review were designed to lessen the dangers of command control. To the same end an amendment to the National Defense Act was enacted setting up a separate Judge Advocate General Corps with a separate promotion list fixing the percentage of officers of the several ranks below that of Brigadier

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General and providing for two Major Generals and three Brigadier Generals. Furthermore, the Elston Act made it proper for judge advocates to communicate directly to the Judge Advocate General rather than through ordinary military channels.

The Uniform Code, which applies to all the services, establishes a Board of Review in the office of the Judge Advocate General of each service. It may be composed of officers or civilians, but each member must be a member of the bar of a federal court or of the highest court of a state. Officers of the Judge Advocate General Department who are not admitted to the bar are therefore not eligible.

The Board reviews all cases where the sentence approved by the convening authority affects a general or flag officer or extends to death, dismissal of an officer or cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for a year or more. It affirms only such finding of guilty or such sentence or part or amount of sentence as it finds correct in law and fact and determines on the whole record should be approved. It weighs evidence, determines credibility of witnesses and determines controverted questions of fact.

If the Board sets aside the findings and sentence, it may order a rehearing, or where it finds the evidence insufficient, it may order the charges dismissed. Its decision in so doing is final and the Judge Advocate General must so instruct the convening authority unless the Judge Advocate General disagrees, in which case he may submit the case to the Court of Military Appeals.

The Code sets up a Court of Military Appeals, consisting of three civilian judges, each of whom receives the salary of a judge of a United States Court of Appeals, \$17,500, but has none of the other emoluments of such a judge. The term of office is 15 years, though in the first court one member was appointed for five years and another for 10 years.

The court is required to review (1) all cases in which the sentence as affirmed by the Board of Review affects a general or flag officer or extends to death, (2) all cases reviewed by the Board which the Judge Advocate General orders forwarded to the court for review. It may receive petitions from an accused to review a case reviewed by the Board and will grant review if good cause is shown. The court acts only with respect to questions of law.

Article 70 of the Uniform Code provides:

- a. The **Judge Advocate** General shall appoint in his office one or

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more officers as appellate Government counsel, and one or more officers ~~as~~ appellate defense counsel who shall be qualified under the provisions of article 27 (b)(1), which prescribes the qualifications of counsel for ~~a~~ general court.

b. It shall be the duty of appellate Government counsel to represent the United States before the board of review or the Court of Military Appeals when directed to do so by the Judge Advocate General.

c. It shall be the duty of appellate defense counsel to represent the accused before the Board of Review or the Court of Military Appeals—

(1) when he is requested to do so by the accused; or

(2) when the United States is represented by counsel; or

(3) when the Judge Advocate General has transmitted ~~a~~ case to the Court of Military Appeals.

In short under the Uniform Code wherever an accused is charged with an offense that carries a serious penalty, he has the benefit of a thorough preliminary investigation at which he has greater protection than is afforded one similarly charged in a civilian court; if brought to trial he is furnished competent military counsel without expense to himself and can employ civilian counsel if he so desires; the court before which he is tried is presided over by a competent lawyer who acts as a judge enforcing such rules of evidence as are usually applied in a United States district court; if convicted he is entitled to a review of his case on the law and the facts by a tribunal composed of competent military counsel without expense to him or by civilian counsel employed by him; and finally, he may on the same terms seek review for errors of law before a court composed of civilians, which will entertain his appeal if he shows good reason therefor; and if he has been sentenced to death, must entertain it.

What then is lacking? In civilian life the judge is appointed or elected in a manner which is free from any reasonable probability of pressure to reach a particular result in any pending case, and the jury is selected in a manner designed to eliminate prejudice or subjection to improper influence. Under the Code the convening authority appoints the judge^e and the court and the defense counsel for the trial of specified charges which he deems supported by sufficient evidence. The primary purpose of the proceeding for the convening authority is the enforcement of military discipline. The members of the court as well as the judge are men to whom military discipline usually seems of high importance, and who are in their ordinary professional activities subject to the authority and

^e Editor.—See editor's note *c supra*.

control directly or indirectly of the convening authority.^f The members of the Board of Review are military men and subject to the ultimate control of military authority. Civilian authority comes into play only as to matters of law.

Everyone realizes the importance of discipline and the necessity of command control in military matters. Only a few have fear of the exercise of improper influence of the convening authority over the Board of Review; but many fear that being military men and part of the military machine, its members may overemphasize the importance of discipline and discount the importance of guaranteeing the accused a fair and impartial trial.^g

The Elston Act with its amendments to the National Defense Act assumes that making the judge advocates general into a corps will make for more efficient personnel and insure independence of action, although the Judge Advocate General is of course under the Chief of Staff. Neither the Navy nor the Air Force has a separate legal corps. Experience under the Code may demonstrate that the Army's administration of justice excels that of the other services, but that remains to be seen.

Ansell's plan of having a general panel selected by the convening authority and the trial judge, who would be appointed by the Judge Advocate General, choose the court from the panel, if practicable, might help; but so long as the court consists of officers subject to control by the convening authority or his associates, the possibility of command interference will persist. If the superior officers in the services are determined to exercise improper control over the trial, no safeguard will suffice so long as the trial court is composed of military men. We may have to come to a system where the trial judge, and the members of the Board of Review, as well as the Court of Appeals, are civilians.

If experience under the Code shows that the influence of command control has not been eliminated,^h it may well be that a new system will have to be established in which the military will have

^f Editor.—The Court of Military Appeals has used the reversal of convictions where there has been any prejudicial command influence as a major device for countering this evil. See, e.g., *United States v. Coffield*, 10 U.S.C.M.A. 77, 27 C.M.R. 151 (1958); *ACM 17919*, Thompson, 32 C.M.R. (1962). See generally U.S. DEP'T OF ARMY, PAMPHLET NO. 27-173, MILITARY JUSTICE—TRIAL PROCEDURE 14-25 (1964), and cases therein cited. Further, there is a growing tendency of the Court to scrutinize the adequacy of representation by appointed defense counsel. See *id.* at 62-71.

^g Editor.—Army boards of review have been transferred into the new Army Judiciary. See Army Regs. No. 22-8 (14 Oct 1964). Compare editor's note *c supra* and text accompanying.

^h Editor.—See editor's notes *a*, *b*, *c*, *f*, *g*, *supra*, and text accompanying.

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control only over the processes of prosecution, and the defense, trial and review be under the exclusive control of civilians. The services have the opportunity of demonstrating to Congress that the concessions made in the Code to the demands for effective discipline do not impair the essentials of a fair, impartial trial and effective appellate review.

That Congress intends to require this demonstration is found in the provision of the Code which requires the Court of Military Appeals and the Judge Advocates General to meet annually to make a comprehensive survey of the operation of the Code and report to the Secretary of Defense, the Secretaries of the Departments and to the Armed Services Committees of the Congress the number and status of pending cases and any recommendations relating to uniformity of sentence, policies, amendments to the Code and the other appropriate matters.ⁱ If this provision is conscientiously observed, Congress and the public can determine whether the area of civil control over the administration of military justice should be expanded. And it should be one of the chief objectives of the Court to see that the provision is observed in spirit as well as letter.

ⁱ *Editor.*—Among significant results have been amendments to the Code changing the nonjudicial punishment article (art. 15). In addition a new Article 58a has been added to provide that an enlisted person sentenced to a dishonorable or bad conduct discharge, confinement, or hard labor without confinement is automatically reduced to pay grade **E-1**. A new Article 123a on making, drawing, or uttering check, draft, or order without sufficient funds has also been added. The annual reports have also recommended giving the Judges of the Court of Military Appeals life tenure. See generally **ANNUAL REPORT(S) OF THE U.S. COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERAL OF THE ARMED FORCES (1952-1964)**. For an analysis of the Court's work in the substantive field, see Zoghby, *Is There a Military Common Law of Crimes?*, 27 **MIL. L. REV.** 75 (1965). See also Wingo and Myster, *A Supplement to the Survey of Military Justice*, *infra* p. 121, and previous surveys cited therein.

A LONG LOOK AT ARTICLE 15*

BY CAPTAIN HAROLD L. MILLER**

I. INTRODUCTION

On September 7, 1962, after trying for one hundred eighty six years,' Army commanders finally succeeded in their efforts to obtain broad statutory authority to administer punishment without resort to trial by courts-martial.' The summary punishment authority given to commanders by the new Article 15 is unprecedented in the history of the United States Army." Although non-judicial punishment has had statutory sanction for nearly fifty years,' punishment authority authorized by Congress prior to the present statute was rather limited.⁵

The changes to Article 15 were primarily intended to correct "serious morale problems adversely affecting discipline . . . engendered by the inadequacy of corrective powers of commanders" ⁶ Other purposes the amendment to Article 15 was expected to accomplish were avoidance of staining military personnel's

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¹ As early as Sept. 22, 1776, Gen. Washington recommended that Army commanders be provided with statutory authority to impose severe summary punishment. See 6 WRITINGS OF WASHINGTON 91-92 (Fitzpatrick ed. 1932) [hereinafter cited as WRITINGS].

² UNIFORM CODE OF MILITARY JUSTICE [hereinafter cited as UCMJ] art. 15.

³ U.S. DEPT OF ARMY, CIRCULAR No. 22-1, para. 1 (Sept. 3, 1963).

⁴ Nonjudicial punishment was first authorized by statute in 1916. See Act of Aug. 29, 1916, ch. 418, § 3, art. 104, 39 Stat. 667 [hereinafter cited as AW 1916, art. 104].

⁵ For example, the maximum punishment imposable upon an enlisted person under Article 15 prior to the recent amendment was reprimand and reduction in grade, or restriction not to exceed fourteen days, or extra duties for fourteen days not to exceed two hours per day. See UNIFORM CODE OF MILITARY JUSTICE, art. 64 Stat. 112 (1950) [hereinafter Article 15, prior to its amendment, will be cited as UCMJ, 1950, art. 15].

⁶ *Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4903 (1962).

records with a criminal conviction,' a reduction in the number of courts-martial,' and to "affect the matter of discharges under other than honorable conditions, which many times are based on the number of courts-martial received."⁸

The purpose of this article is to examine and discuss this new punishment authority now exercised by military commanders. In taking this long look at Article 15, I hope to provide the practicing Army lawyer with a better understanding of the background and purpose of nonjudicial punishment, to raise and discuss some of the problems encountered in administering such punishment in the Army, and to suggest methods by which some of those problems can be resolved.

II. HISTORICAL BACKGROUND

A. *THE REVOLUTIONARY WAR YEARS*

The first Articles for the Government of the Navy authorized commanding officers to inflict punishment upon officers and men of their commands without resort to trial by courts-martial."⁷ For swearing or cursing, a seaman was required to wear a wooden collar or other shameful badge of distinction for as long as his commander judged proper; for drunkenness, he was put in irons until he was sober." Offenses of the same nature committed by officers were punished by forfeitures of pay." The authority of commanding officers in the Navy to impose summary punishment has survived until the present time.¹³

The first Articles of War were passed by the Continental Congress on June 30, 1775." Articles 11, 111, and XVIII of the 1775 Articles authorized punishment without trial for such offenses as indecent behavior at divine services, profanity, and failure to retire to quarters or tent at retreat." Punishment authorized for those offenses included forfeiture of pay and short periods of confinement.¹

⁷ *Hearings on H.R. 11257 Before a Subcommittee of the Senate Committee on Armed Services*, 87th Cong., 2d Sess. 6 (1962).

⁸ *Id.* at 3.

⁹ *Id.* at 3.

¹⁰ III JOURNALS OF THE CONTINENTAL CONGRESS 378 (Ford ed. 1905) [hereinafter cited as JCC].

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See Act of July 17, 1862, ch. CCIV, art. 10, 12 Stat. 603; UCMJ, 1950, art. 15.

¹⁴ II JCC, *op. cit. supra* note 10, at 111.

¹⁵ *Id.* at 112-15.

¹⁶ *Id.*

Although summary punishment for a few minor derelictions was authorized by the 1775 Articles, the Congress did not provide Army commanders with authority to similarly punish the wide variety of minor offenses that are characteristic of soldiers of any army. What Congress did not see fit to provide by statute, however, General Washington and other commanders of the Revolutionary Army provided for themselves. By General Orders dated September 19, 1776, Washington directed that:

[A]11 . . . officers are charged . . . to seize every soldier carrying Plunder . . . [and the] Plunderer [is to] be immediately carried to the . . . Brigadier or commanding officer of a regiment, who is instantly to have the offender whipped on the spot."

Apparently because he was experiencing difficulty in disciplining the Army (and possibly having some doubt as to the authority by which he was ordering summary punishment), Washington sent a letter to the President of Congress on September 22, 1776, wherein he said:

Some severe and exemplary Punishment to be inflicted in a summary Way must be immediately administered, or the Army will be totally ruined. I must beg the immediate Attention of Congress to this Matter as of the utmost Importance to our Existence as an Army."

Two days later, in another letter to Congress, Washington renewed his complaint concerning lack of adequate laws to punish offenders and notified Congress that he had ordered instant corporal punishment for disobedience of orders." Congress had been considering a revision of the 1775 Articles, and on September 20, 1776 (two days before Washington dispatched his letter to Congress), the new articles were passed." General Washington was not provided with the summary punishment authority he sought, however. Congress added only one new article whereby a soldier could be punished without a trial. Article 1 of Section VII²¹ prohibited the use of reproachful or provoking speeches and gestures and for violations of the article, authorized the punishments of arrest (for officers) and imprisonment.

Evidently this new article did not solve Washington's problems, for by General Orders dated October 31, 1776, he authorized all officers to seize any man who fired his gun without leave and to have him tied up and immediately given twenty lashes."

¹⁷ 6 WRITINGS, *op. cit. supra* note 1, at 70.

¹⁸ *Id.* at 91-2.

¹⁹ *Id.* at 114.

²⁰ V JCC, *op. cit. supra* note 10, at 788.

²¹ *Id.* at 793.

²² 6 WRITINGS, *op. cit. supra* note 1, at 233-34.

Washington was not alone in using general orders to solve disciplinary problems. By orders dated July 29, 1777, Major General Israel Putman authorized his Sergeant Major to peremptorily order into confinement all sergeants that were not properly attentive to their duties.²³

Because of recurring problems in maintaining discipline, Washington again made recommendations to Congress concerning his need for summary punishment authority. In a letter to Congress dated January 29, 1778, he said:

There are many little crimes and disorders incident to soldiery, which require immediate punishment and which from the multiplicity of them, if referred to Court Martials, would create endless trouble, and often escape proper notice: These, when soldiers are detected in the fact, by the provost marshals, they ought to have a power to punish on the spot; subject to proper limitations and to such regulations, as the commander in chief according to customs and usages of War, shall, from time to time, introduce.²⁴

The statutory authority requested by Washington was not to be provided. Congress, having previously been informed that he had ordered instant corporal punishment for disobedience of orders,²⁵ may have assumed that Washington could continue to solve other disciplinary problems in a similar manner. Whatever their reasons, statutory authority to summarily punish minor offenses was not to be provided commanding officers in the Army until 1916.²⁶

As the War and disciplinary problems incident to it continued, so did Washington's general orders authorizing the infliction of summary punishment. For example, the offense of wasting ammunition carried with it the penalty of being tied up and receiving thirty-nine lashes on the bare back." Leaving the company area at night for the purpose of marauding was immediately punishable by not to exceed one hundred lashes.²⁷

B. THE NINETEENTH CENTURY

The end of the Revolutionary War did not, of course, end the Army's disciplinary problems. Since no statutory authority existed giving commanders authority to punish minor offenses without trial, they apparently continued to follow the example set by

²³ GENERAL ORDERS ISSUED BY GENERAL PUTMAN 41 (Ford. ed. 1893).

²⁴ 10 WRITINGS, *op. cit. supra* note 1, at 362, 376.

²⁵ 6 *id.* at 114.

²⁶ AW 1916, art. 104.

²⁷ 11 WRITINGS, *op. cit. supra* note 1, at 249.

²⁸ 25 *id.* at 354-55.

General Washington ; that is, they imposed summary punishment on their own authority."

The disciplining of Cadets at the Military Academy provides another clue to how commanders handled their disciplinary problems prior to the time Congress saw fit to provide statutory authority for summary punishment. Academy Regulations authorized the Superintendent to impose such summary punishments as privation of recreation, extra tours of duty, reprimand, and arrest or confinement in quarters.³⁰

In 1835, regimental commanders were given authority by Army Regulations to reduce noncommissioned officers." At one time, even captains were authorized to reduce their first sergeants.³²

The increase in the size of the Army during the Civil War brought with it a corresponding increase in disciplinary problems. Since statutory authority to summarily punish minor offenses was still not available, Washington's device of supplying the needed authority by issuing general orders was put to work again.³³

Some of the punishments administered during the Civil War were, to say the least, rather unusual. One punishment that must have been particularly effective was that of staking an offender out on the ground and pouring molasses on his hands; feet, and face." Whipping, confinement in the guard house, carrying a ball and chain, and tying up by the thumbs were other punishments awarded to offenders without benefit of a trial.³⁵

A soldier who served with the Army of the Potomac recorded several practices employed by Civil War commanders to correct minor offenders." One means used was called the "black list."³⁷ This consisted of placing the names of frequent offenders on a list and drawing names from that list to perform disagreeable tasks such as digging or filling company sinks, burying dead horses, and

³⁰ AMERICAN STATE PAPERS, 11 MILITARY AFFAIRS 39 (Lowrie & Franklin ed. 1834).

³¹ United States Military Academy Regs. para. 91 (1832).

³² Army Regs. art. IX, para. 13 (1835). Previously, the authority to reduce noncommissioned officers without resort to trial by court-martial was limited to cases of incapacity. See Army Regs. art. X, para. 22 (1834).

³³ Army Regs. art. XIX, para. 169 (1879).

³⁴ For example, wasting ammunition was authorized punishment in this manner. XI War of the Rebellion, Official Records, Series I, pt. 3, at 83-4 [hereinafter cited as O.R. Series I].

³⁵ XXVI O.R. Series I, pt. 1, at 468.

³⁶ *Id.* at 466.

³⁷ BILLINGS, HARDTACK AND COFFEE (1888).

³⁸ *Id.* at 145.

cleaning up around the picket rope where the animals were tied.³⁸ "Knapsacking" was another method reportedly used to punish minor offenders."³⁹ This punishment required one to march up and down the company street with a knapsack filled with bricks.

Another ingenious punishment said to have been awarded for minor offenses involved the use of a platform twenty-five to thirty feet high. The accused person was placed on the platform and left to "broil in the sun or soak in the rain while a guard paced his beat below, to keep away any who might like to communicate with him."⁴⁰ Other offenders had their offense written on a board, and with the board strapped on their backs, were marched through camp the entire day without rest.⁴¹ The favorite punishment in the Artillery was reported to be lashing the guilty party to the spare wheel carried on the rear of every caisson.⁴²

Although the Civil War commander did not have statutory authority to punish minor offenses without trial, Congress did relieve the commander's disciplinary problems somewhat with the Field Officer's Court."⁴³ This court consisted of one field grade officer with authority to try and punish enlisted men for non-capital offenses.⁴⁴ Its punishment authority was limited to that of a garrison or regimental court-martial; that is, it could impose a fine not to exceed one month's pay and imprisonment or hard labor for not to exceed one month.⁴⁵

Although summary punishment was imposed by commanders without express Congressional sanction, the Army was still of the opinion that a statute conferring this authority upon commanding officers was needed. In his report to the Secretary of War in 1886, the Acting Judge Advocate General of the Army, in concluding such authority was desirable, said:

It may be safely stated that the Army is of one opinion on this subject, and that this power, within certain narrow and well-defined limits, may without danger of abuse be intrusted to commissigned officers.

Officers differ in their understanding of their relation to enlisted men, as well as in their character for independence. The consequence is that whereas one company commander will bring every case, however insignificant, before a court-martial, another will find a more expeditious

³⁸ *Id.*

³⁹ *Id.* at 146-47.

⁴⁰ *Id.* at 147.

⁴¹ *Id.* at 148.

⁴² WILKESON, RECOLLECTIONS OF A PRIVATE SOLDIER 32 (1887).

⁴³ Act of July 17, 1862, ch. CCI, § 7, 12 Stat. 598.

⁴⁴ *Ibid.*

⁴⁵ Act of April 10, 1806, ch. XX, art. 67, 2 Stat. 367.

way of disposing of trifling. lapses from duty, as, for example, by a deprivation of privileges."

In 1890, Congress provided a new military court designed to aid the Army in its administration of justice. Called the "Summary Court," .. it was similar to the Field Officer's Court in its jurisdiction as to persons, offenses, and punishment authority. It consisted of the line officer second in rank at the post, station or command of the alleged offender. The act expressly provided that enlisted men brought before the court could object to a hearing and request trial by court-martial, which request was to be granted as a matter of right.⁴⁶

The summary court procedure was soon doing a "land office" business. In his report to the Secretary of War in 1892, the Acting Judge Advocate General, in commenting on the mass of cases tried by summary courts stated:

With regard to the summary court it will perhaps become a question whether it ought not to be relieved of that mass of trivial delinquencies [sic] which in the days of the garrison court-martial were in general disposed of without trial. Sixteen thousand six hundred and seventy trials by inferior courts-martial have been reported for the eleven months ending August 31st, and nearly all of these were by summary court. To those who do not understand that the summary court is a court of very limited jurisdiction, and that in a large number of the cases tried the sentences were of the lightest kind—sometimes as little as a forfeiture of 25 cents—the number of trials is appalling, and gives an entirely erroneous impression of the condition of the discipline of the Army. It is owing to the fact that on account of the convenience of the summary court *a large number of those petty delinquencies [sic] are now tried by it which company commanders formerly settled for themselves.* The power of withholding privileges and indulgences is the same now as before the passage of the summary court act [Emphasis added.]⁴⁷

Included within the Acting Judge Advocate General's report was a report from Major S. S. Groesbeck, Judge Advocate Department of the Missouri, who, in commenting on the large number of cases tried by summary courts said:

These large percentages indicate that the summary court has permanently increased the number of trials, but when it is recalled that *before the summary court was established it was customary to arbitrarily confine men in the guard-house for seven days Without trial* (often ill

⁴⁶ 2 House Executive Documents, 49th Cong., 2d Sess. 311, 315–16 (1886–1887).

⁴⁷ Act of Oct. 1, 1890, ch. 1259, 26 Stat. 648.

⁴⁸ *Ibid.* The Act of June 18, 1898, ch. 469, 30 Stat. 483, limited the right to object to a hearing before a summary court to noncommissioned officers.

⁴⁹ 1 Annual Rep. of the Sec. of War 207, 210 (1892).

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advised) it is doubtful if there has been any actual increase in the number of punishments. [Emphasis added.]⁵⁰

The practice of punishing minor offenses without trial was officially sanctioned by the Army in 1895. In an attempt to reduce the number of courts-martial, it was provided that:

Commanding officers are not required to bring every dereliction of duty before a court for trial, but will endeavor to prevent their recurrence by admonitions, withholding of privileges, and taking such steps as may be necessary to enforce their orders.⁵¹

A limitation was placed on this authority in 1898 by affording offenders the right to refuse this summary punishment procedure and demand a trial by court-martial. In this respect, it was provided that:

. . . company commanders are authorized . . . to dispose of cases of derelictions of duty in their commands which would be within the jurisdiction of inferior courts-martial by requiring extra tours of fatigue, *unless the soldier concerned demands a trial*. This right to demand a trial must be made known to him. [Emphasis added.]⁵²

C. THE TWENTIETH CENTURY

Apparently because of concern about the legality of imposing summary punishment without statutory authority, an article expressly providing for such punishments ~~was~~ included in a revision of the Articles of War that was presented to Congress in 1912. This conclusion is based on the testimony of Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army, who, in testifying before the House Committee on Military Affairs, said:

Article 104 is a new article in this code. It has a special purpose. Our existing code embodies no express recognition of punishments other than such as can be inflicted by a court-martial. Summary punishments have not been recognized except in 25, 52, and 53 of the existing articles. They require certain administrative punishments, such as to ask pardon for using provoking speeches (art. '25), small forfeitures for misbehavior at any place of divine worship, or profanity. There is no record that these articles have ever had any execution, and I have asked to have all of them except article 25 omitted from the code. If they go out, there will be no recognition in the code anywhere of summary punishment.

⁵⁰ *Id.* at 227-28. Concerning Maj. Goresbeck's reference to the custom of arbitrarily confining men in the guardhouse for seven days, this indicates that Rev. Stat. § 1342, art. 70 (1875), which provided that neither officers nor soldiers put in arrest or confinement should be continued in such arrest or confinement for more than eight days or until such time as a court-martial could be assembled, was construed to mean that confinement without trial was authorized as long as it did not exceed eight days.

⁵¹ Army Regs. para. 930 (Oct. 31, 1895).

⁵² Manual for Courts-Martial, United States Army, 1898, at 68-9.

*Now, there has been a demand among our company commanders for a long time for more disciplinary power over their men. We have been going step by step, by regulations, to give them that power. The company commander likes to feel that this disciplinary arm is strong in dealing with the family of 65 men which the law gives him to govern. It seemed to me that we were on rather dangerous ground in trying to grant that power by regulation alone, especially as it seemed to be a principle of our code, that punishment should be judicially imposed. I have undertaken to write into a new article the provisions of the existing regulations on this subject which have stood the test of experience. [Emphasis supplied.]*⁵³

The summary punishment article proposed by General Crowder was subsequently enacted in 1916.⁵⁴

This article authorized commanding officers of detachments, companies, and higher commands to impose punishments upon persons of their commands *for minor offenses not denied by the accused*. Punishments authorized included admonition, reprimand, withholding of privileges, extra fatigue, and restriction. Forfeiture of pay and confinement under guard were prohibited as punishments. No limit on the duration for which the punishments could be imposed was included in the article. Legislative history of the article indicates that the duration of the punishments would be discretionary with post commanders.⁵⁵

Following World War I, a demand for revision of the Articles of War was raised and extensive hearings were held concerning proposed changes in the administration of Military Justice." Although the Articles of War had been revised only four years earlier, a new revision was passed following the hearings. Article 104 was among those articles changed."

The changes related primarily to the imposition of statutory limitations on the duration for which the authorized punishments could be imposed." The maximum duration for withholding of privileges, restriction, extra fatigue, and hard labor without con-

⁵³ *Hearings on H.R. 25628 Before the House Committee on Military Affairs*, 62d Cong., 2d Sess. 88 (1912).

⁵⁴ AW 1916, art. 104.

⁵⁵ *Hearings on H.R. 23628*, *supra* note 53, at 89.

⁵⁶ *Hearings on S. 64 Before the Subcommittee of the Senate Committee on Military Affairs*, 66th Cong., 1st Sess. (1919); *Hearings on S. 5320 Before the Senate Committee on Military Affairs*, 65th Cong., 3d Sess. (1919); *Hearings on Amendments to the Articles of War Before a Special Subcommittee of the House Committee on Military Affairs*, 66th Cong., 2d Sess. (1920).

⁵⁷ Act of June 4, 1920, ch. 227, ch. II, art. 104, 41 Stat. 808 (hereinafter cited as AW 1920, art. 104).

⁵⁸ *Ibid.*

finement was limited to one week.⁵⁹ The previous disciplinary punishment article had authorized punishment for minor offenses *not denied by the accused*.⁶⁰ That limitation on the authority of commanders to impose disciplinary punishment was deleted in the revised article. In addition, the revised article authorized a commander in the grade of Brigadier General or higher to impose a forfeiture of pay upon officers below the grade of major during time of war or grave public emergency.

Further changes to the article authorizing disciplinary punishment were recommended in the hearings conducted by Congress in 1947, concerning the administration of justice in armed services. Brigadier General Hubert D. Hoover, the Assistant Judge Advocate General of the Army, in testifying before those hearings, recommended that the article be changed to make it clear that the various punishments authorized could be combined. He also recommended that the forfeiture provision be extended to any officer below the grade of Brigadier General and that the amount of pay subject to forfeiture be increased to one half pay per month for three months." These changes were subsequently incorporated into Article 104."

The disciplinary punishment article was amended again in 1950.⁶¹ By this amendment the duration for which the punishments could be imposed was extended to two weeks, the former provision authorizing combination of punishments was deleted, and the provision concerning forfeiture of pay was reduced to a maximum of one-half pay per month for one month and was extended to all officers regardless of grade." The provisions of Article 15, as enacted in 1950, remained in effect without change until 1962.

111. NONJUDICIAL PUNISHMENT AND DUE PROCESS OF LAW

A former Judge Advocate General of the Army stated that "it [seems] to be a principle of our code that punishment should be judicially imposed." ⁶² Be that as it may, the previous discussion of the historical background of nonjudicial punishment establishes

⁵⁹ *Ibid.*

⁶⁰ AW 1916, art. 104.

⁶¹ *Hearings on H.R. 2575 Before Subcommittee No. 11 of the House Committee on Armed Services, 80th Cong., 1st Sess. 2133-134 (1947).*

⁶² Act of June 24, 1948, ch. 625, tit. II, art. 104, 62 Stat. 641.

⁶³ UCMJ, 1950, art. 15.

⁶⁴ *Ibid.*

⁶⁵ *Hearings on H.R. 29628, supra note 53, at 88.*

that punishment has been nonjudicially imposed for more than one hundred fifty years: Yet, during that period of time, the constitutionality of nonjudicial punishment has apparently never been raised in the courts—civil or military. Although it has not been raised previously, the substantial increase in punishment power under the amended article increases the likelihood that the constitutional question will be raised in the future.

The constitutionality of Article 15 may be raised in various ways. For example, an offender who has been reduced in pay grade under Article 15 could raise the issue in a suit in the Court of Claims to recover pay and allowances lost as a result of the reduction. An accused tried by general court-martial for breach of correctional custody, one of the new punishments authorized by the new article, could raise the issue at his trial and on appeal, if convicted. Thus, the question of the constitutionality of Article 15 is not merely academic.

Because the courts have not clearly settled the question of whether servicemen have constitutional rights, this discussion of the constitutionality of Article 15 must necessarily be preceded by a determination of whether the Bill of Rights applies to military personnel.

A. CONSTITUTIONAL RIGHTS OF SERVICEMEN

1. *In the Federal Civil Courts.*

Although there is some evidence that the framers of the Constitution intended that the Bill of Rights should apply to servicemen," the original practice and the early decisions of the federal courts support a contrary view." Until well into the present century, the view generally held was that constitutional protections of personal liberty did not of their own force apply to servicemen.⁶⁶ This view was reinforced by the notorious dicta of the Supreme Court that "the power of Congress, in the government of the land and naval forces . . . is not affected by the fifth or any other amendment,"⁶⁷ and that "To those in the military or

⁶⁶ Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

⁶⁷ Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1-2), 72 HARV. L. REV. 1, 266 (1958).

⁶⁸ See WINTHROP, *MILITARY LAW AND PRECEDENTS* 165, 287, 398 (2d ed. GPO Reprint 1920).

⁶⁹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 138 (1866) (minority concurring opinion) (dictum).

naval service of the United States the military law is due process.'" The bulk of the Supreme Court's decisions in this area, however, were concerned not with the extent of servicemen's constitutional rights, if any, but with establishing and maintaining the doctrine that the federal civil courts were not an appropriate forum to decide such questions."

The twentieth century, however—with its two World Wars, establishment of a large standing Army of conscripted civilians, and the defects in the system of military justice that thereby became apparent to the public—has witnessed increasing concern for the recognition of servicemen's rights," and pressure on the federal courts to assume some responsibility for enforcing such rights by entertaining collateral attacks on court-martial conviction. Under this pressure, the federal courts began to loosen their traditional approach to military convictions." The Supreme Court finally responded to this pressure in a series of cases culminating with *Burns v. Wilson*.⁷⁵ The holding of *Burns* is unclear, since four separate opinions were written, none of which received the concurrence of a majority of the Court. The thrust of the case, however, clearly portends a liberalization of the Court's traditional position.⁷⁶ Some have construed it to mean that servicemen have all the protections of the Bill of Rights except such as are expressly or by necessary implication not applicable by reason of the

⁷⁰ *Reeves v. Ainsworth*, 219 U.S. 296, 304 (1911) (dictum).

⁷¹ See, e.g., *Hiatt v. Brown*, 339 U.S. 103 (1950); *Collins v. McDonald*, 258 U.S. 416 (1922); *In re Grimley*, 137 U.S. 147 (1890); *Ex Parte Reed*, 100 U.S. 13 (1879); *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

⁷² For an instance of aroused concern, see *Bruce, Double Jeopardy and Courts-Martial*, 3 MINN. L. REV. 484 (1919).

⁷³ See, e.g., *Schita v. King*, 133 F.2d 283 (8th Cir. 1943); *Sanford v. Robins*, 115 F.2d 435 (5th Cir. 1940), cert. denied, 312 U.S. 697 (1941).

⁷⁴ See, e.g., *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949), rev'd sub nom. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Powers v. Hunter*, 18 F.2d 141 (10th Cir. 1949); *United States ex rel. Innes v. Hiatt*, 141 F.2d 664 (3d Cir. 1944); *Beets v. Hunter*, 75 F. Supp. 825 (D. Kan. 1948), rev'd on other grounds, 180 F.2d 101 (10th Cir. 1950), cert. denied, 338 U.S. 832 (1949); *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D.Pa. 1946).

⁷⁵ 346 U.S. 137 (1953). The peripatetic course of the Court's decisions leading up to *Burns* is traced in *Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40 (1961).

⁷⁶ The dispute has centered around the extent of the liberalization. See *Bishop, supra* note 75; *Kuenzle, Federal Court Jurisdiction Over Courts-Martial*, 1 WASHBURN L. J. 25 (1960); *Pearl, The Applicability of the Bill of Rights to a Court-Martial Proceeding*, 50 J. CRIM. L., C. & P.S. 559 (1960); *Note, Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964).

peculiar circumstances of the military." Subsequent related decisions⁷⁸ and public statements of some members of the Court⁷⁹ indicate that at least a majority of the present Court would probably subscribe to the latter view, and would hold that the federal courts are an appropriate ultimate forum for the vindication of such rights.

2. In the Court of *Military Appeals*.

Whether the Bill of Rights is applicable to servicemen and military courts may not be clear to the Supreme Court, but it is clear to the Court of Military Appeals. Initially indicating that due process in the military was not bottomed on the Constitution but rather on laws enacted by Congress,⁸⁰ the Court recently resolved the issue in *United States v. Jacoby*,⁸¹ when Chief Judge Quinn, speaking for the majority said, "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."⁸²

Although the views of one member of the present Court *may* not be in accord with those expressed by Chief Judge Quinn,⁸³

⁷⁷ The Court of Military Appeals reads *Burns* in this way. See *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960). Compare *Wade v. Hunter*, 336 U.S. 684 (1949) (double jeopardy protection means that mistrial can be properly declared only for "manifest necessity in the interest of justice" but urgent requirements of movement of troops in combat may qualify as such "manifest necessity" in the military). The Court of Claims also understands this to be the law. See *Narum v. United States*, 287 F.2d 897 (Ct. Cl. 1961); *Begalke v. United States*, 286 F.2d 606 (Ct. Cl. 1961).

⁷⁸ Compare *Green v. McElroy*, 360 U.S. 474 (1959); *Trop v. Dulles*, 356 U.S. 86 (1958); *Harman v. Brucker*, 355 U.S. 579 (1958). Also to be considered in this connection is the series of recent cases finding various provisions of the Bill of Rights inherent in "due process" and therefore binding upon the states by virtue of the 14th Amendment. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (search and seizure). In addition, the Court's recent sweeping recharacterization of the scope and purpose of federal habeas corpus in reviewing state convictions must be considered. *Fay v. Noia*, 372 U.S. 391 (1963) (writ never was limited to matters of jurisdiction only, but designed to remedy restraints of liberty in violation of fundamental law).

⁷⁹ See Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962).

⁸⁰ *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

⁸¹ 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

⁸² 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960), citing *Burns v. Wilson*, 346 U.S. 137 (1953); *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947); *United States ex rel. Innes v. Hiatt*, 141 F.2d 644 (3d Cir. 1944).

⁸³ See Judge Kilday's opinion in *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963), where he expressed the opinion that the right to counsel provision of the Sixth Amendment was not applicable to servicemen.

there can be no serious question concerning the applicability of the Bill of Rights to servicemen as long as the Chief Judge and Judge Ferguson remain on the Court.

B. NONJUDICIAL PUNISHMENT: CONSTITUTIONAL?

The summary punishment procedure used by the armed services is similar to forms of summary justice to which civilians are subjected. For example, justice dispensed in the average Justice of the Peace or Mayor's Court is, from this writer's personal observations, essentially a swift, inexpensive means of punishing minor offenses in which the usual rules of procedure and evidence are dispensed with. In the usual case, the "Justice" is not a lawyer, the accused is not represented by counsel, few if any witnesses are called, the charge is often stated in vague terms, and there is no jury. Although the rules vary from state to state, the individual convicted by a summary court of this nature may often appeal and receive a trial by jury in a court of general jurisdiction. In comparing this procedure with military nonjudicial punishment, many similarities can be noted.

But even though the military procedure for nonjudicial punishment might be unconstitutional if it were made a part of a *civilian* legal system, that alone would not warrant a conclusion that it is unconstitutional as applied to military persons. Armed Services require maintenance of a high standard of discipline, since discipline is essential in order that an armed force may be effective."⁸⁴ As Justice Black has said, "because of its very nature and purpose the military must place great emphasis on discipline and efficiency."⁸⁵

At the outset, it might be argued that the right to demand trial by court-martial (in lieu of accepting punishment under Article 15)⁸⁶ moots any issue as to the constitutionality of nonjudicial punishment, upon some sort of waiver theory. This argument has a superficial appeal, but upon careful consideration, it appears unsound for the following reasons. The right to demand trial does not exist at all if the accused is "attached to or embarked in a vessel,"⁸⁷ and the extent to which personnel may be so attached is not defined in the statute.⁸⁸ When the right does exist, it seems

⁸⁴ H.R. REP. No. 1612, 87th Cong., 2d Sess. 3 (1962).

⁸⁵ Reid v. Covert, 354 U.S. 1, 36 (1957).

⁸⁶ UCMJ art. 15(a), discussed *infra* at pp. 84-89.

⁸⁷ UCMJ art. 15(a).

⁸⁸ See *infra* pp. 84-89.

unrealistic to find waiver unless the accused is informed of the procedural rights to which he would be entitled in a court-martial and their significance in his case. Effectively, this could not be assured absent the advice of counsel, a right to which is not accorded in the statute and seems not to have been contemplated by Congress.⁸⁹ Lastly, analogies to guilty pleas in inferior courts-martial are of dubious relevance because acceptance of Article 15 punishment is not an admission of guilt.⁹⁰ For the above reasons, it cannot be reliably assumed that the right to demand trial moots the constitutionality of nonjudicial punishment (although the right is probably a factor to be considered). It seems advisable at the present time, therefore, to meet the constitutional question head-on.

In providing "for the common defense,"⁹¹ Congress is expressly authorized by the Constitution "to declare war,"⁹² "to raise and support armies,"⁹³ "to provide and maintain a navy,"⁹⁴ and "to make rules for the government regulation of the land and naval forces,"⁹⁵ and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."⁹⁶ In carrying out these duties, in recent years, Congress has seen fit to maintain large standing military forces to guard and preserve the existence of this nation."

To accomplish this enormous task, the armed forces must be effective—they would be useless in time of national peril if they were not capable of waging war successfully. As previously indicated, to be effective, an army must be well disciplined. That is, members of all military organizations, regardless of size, must be mentally conditioned to immediate obedience of all orders and commands issued by any military superior. To assure that such a state of discipline is reached and maintained, Congress, in its

⁸⁹ See *infra* pp. 100-01.

⁹⁰ Pp. 88-9 *infra*. However, to the extent that the procedural significance of a guilty plea is not as an admission of guilt but as a waiver of the necessity of proving guilt judicially (which significance is more evident in a plea of *nolo contendere*), it may be that the analogous (although somewhat different) waiver of trial by acceptance of Article 15 proceedings (when trial is available) obviates the constitutional problem to that extent.

⁹¹ U.S. CONST. art. I, § 8, cl. 1.

⁹² U.S. CONST. art. I, § 8, cl. 11.

⁹³ U.S. CONST. art. I, § 8, cl. 12.

⁹⁴ U.S. CONST. art. I, § 8, cl. 13.

⁹⁵ U.S. CONST. art. I, § 8, cl. 14.

⁹⁶ U.S. CONST. art. I, § 8, cl. 18.

⁹⁷ H.R. REP. NO. 1612, *supra* note 84, at 3.

judgment, has determined that it is necessary for military commanders to have authority to inflict summary punishment for minor offenses." This means, *inter alia*, that the military commander giving the order or command will usually be in a position to swiftly and effectively punish its disobedience.

To maintain discipline and thus to maintain an effective army, it is necessary for Congress to strike a balance between the rights of individuals and the methods by which the services are to maintain discipline. In so doing, the balance struck must sometimes infringe upon normal civilian individual rights. When our continued national existence is at stake, individual rights guaranteed by the Constitution may have to give way,⁹⁸ for it is not possible to lose the nation and yet preserve the Constitution."⁹⁹

The Supreme Court has previously decided that Congress' power to provide for punishment of military offenses is independent of the judicial power of the United States set forth in the Third Article of the Constitution."¹⁰⁰ This does not mean, however, that Congress' judgment in the exercise of its war power is never subject to review by the courts."¹⁰¹ On the contrary, the Court has not only reviewed Congress' judgment but has declared legislation enacted to effect that judgment to be unconstitutional in several cases.

In *Toth v. Quarles*,¹⁰² The Court struck down Article 3(a), *Uniform Code of Military Justice*, which provided for court-martial jurisdiction over former military persons who, while on active

⁹⁸ "The authority of military commanders to impose . . . [nonjudicial] punishment is historic and universally acknowledged to be essential to the preservation of discipline and the maintenance of an effective armed force." *Id.* at 2.

⁹⁹ See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). These cases involved American citizens of Japanese ancestry who were tried and convicted for violation of a Civilian Exclusion Order promulgated by an army commander during World War II under the authority of a Presidential Executive Order and an act of Congress. The order—prompted by fear of sabotage, espionage and possible invasion—directed exclusion of all persons of Japanese ancestry, citizen or alien, from certain areas on the west coast of the United States. In upholding its constitutionality, the Court said in *Hirabayashi*, *supra*, that the war power is the power to wage war successfully and that the Constitution, in committing the exercise of the war power to Congress and the Executive, necessarily gives them wide scope in determining the means to resist threatened danger to the nation. Compare *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁰⁰ Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 200 (1962).

¹⁰¹ *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

¹⁰² For a contrary view, see Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 COLUM. L. REV. 127 (1964).

¹⁰³ 360 U.S. 11 (1955).

duty, commit an offense against the Code that is punishable by confinement at hard labor for five years or more and which cannot be tried in the civil courts. It was expressly stated in *Toth* that Article 3(a) could not be sustained as a "necessary and proper" implementation of Congress' constitutional power to raise and support armies, to declare war, or to make rules for the government of the armed forces.

In *Reid v. Covert*,¹⁰⁴ Article 2(11) of the *Uniform Code of Military Justice*, providing for courts-martial jurisdiction over civilian employees and dependents accompanying the armed forces overseas, was declared unconstitutional. *Trop v. Dulles*¹⁰⁵ voided an act of Congress that denationalized any citizen convicted by a court-martial of wartime desertion and sentenced to a dismissal or dishonorable discharge. One of the bases for the decision in *Trop* was that the act, being penal in nature, prescribed a cruel and unusual punishment in violation of the Eighth Amendment. As Chief Justice Warren said, "The need for military discipline was considered an inadequate foundation for expatriation."¹⁰⁶

Although the "balance" Congress has struck is subject to judicial review, the courts are not likely to second-guess Congress on many occasions in this area. The Supreme Court, recognizing Congress' duties in the area of its war power, has said:

where . . . the conditions call for the exercise of judgment and discretion and for the choice of *means* by these branches of Government on which the Constitution has placed the responsibility of war making, it is not for any court to sit in review of the wisdom of their *action* or substitute its judgment for theirs. [Emphasis added.]¹⁰⁷

This view was reaffirmed in *Burns v. Wilson*,¹⁰⁸ in which Chief Justice Vinson said, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment."¹⁰⁹ In other words, Congress is more competent to strike the "precise balance."

As the punishment power authorized by Article 15 increases, its constitutionality becomes more questionable. At some point,

¹⁰⁴ 354 U.S. 1 (1957). *Kinsella v. Krueger*, 351 U.S. 470 (1956), a companion case to *Reid v. Covert*, was reheard and decided at the same time. The opinion in *Reid* extends to both cases.

¹⁰⁵ 356 U.S. 86 (1958).

¹⁰⁶ Warren, *supra* note 100, at 191.

¹⁰⁷ *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

¹⁰⁸ 346 U.S. 137 (1953).

¹⁰⁹ *Id.* at 140.

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the punishment would become so severe that the rights of individuals would outweigh the needs of the services with respect to maintenance of discipline. The punishment power presently authorized by the Article does not appear to have yet reached that point. As the civil courts have not passed on the Article's constitutionality, whether they would agree that that point has not been reached cannot be conclusively determined. For this reason, it seems advisable, in administering nonjudicial punishment, to make available to offenders all the procedural rights *suggested* in the Manual and Regulations, unless there is some manifest military necessity for not doing so. Those procedural rights, together with the statutory right to demand trial in lieu of disciplinary punishment (except when attached to or embarked on a vessel) would certainly be a factor that would influence the courts to declare the Article constitutional.

On the whole, considering that some rights of the military person must give way to the "overriding demands of discipline and duty," and that Article 15, UCMJ, is exactly what Congress has deemed necessary to enforce speedy and effective discipline in the armed forces, it is not unreasonable to predict that the civil courts would find that the balance struck by Congress with its new nonjudicial punishment legislation is a proper exercise of its Article I war power. The needs of the services in maintaining discipline outweigh any infringement upon individual rights resulting from the *proper* exercise of the powers granted by the present Article 15. "In the military, by necessity, emphasis must be placed on the security and order of the group rather than on . . . the individual."¹¹⁰

Balancing the rights of individuals against the minimum power essential to enforce discipline in the armed forces (and thereby preserve national security) is an inexact science at best. If any error of judgment is to be made in striking this balance, it would seem better to give the armed forces more power than needed rather than not enough.

Historically, punishment without trial has been imposed upon offenders by military commanders without statutory authority. For almost one hundred fifty years, summary punishment was apparently considered to be an inherent power of command. As that power was inherent to command and could be exercised without statutory authority, it can be argued that Congress, by enacting nonjudicial punishment legislation, has merely indicated its con-

¹¹⁰ Reid v. Covert, 354 U.S. 1, 39 (1957)

sent to, and placed limitations on, the exercise of that inherent power. Therefore, it might well be argued that Article 15 is constitutional, not because it is a lawful exercise of Congress' power to make rules for the government of the armed forces, but because it is merely a codification of an inherent power of command that has been exercised since the armed services were organized in 1775. The validity of this argument is somewhat questionable in view of the fact that Congress has continuously controlled the services in the exercise of disciplinary punishment power since the first nonjudicial punishment statute in 1916. Thus, for almost fifty years, disciplinary punishment has been imposed under the authority of Congress rather than the inherent authority of command. It would seem likely, therefore, that the constitutionality of Article 15, when judicially determined, will turn on the question of whether it is a lawful exercise of Congress' war power. Nevertheless, in deciding the question, the courts should be aware that summary punishment was imposed by military commanders prior to the enactment of a disciplinary punishment statute and that the services would likely revert to that practice if Article 15 were held unconstitutional. With regard to the offender, there can be little question that it would be to his advantage if the Article is declared constitutional.

The Court of Military Appeals has not been presented with a question challenging the constitutionality of nonjudicial punishment. However, cases involving such punishment have been before the Court on many occasions and there has been no suggestion or intimation that its constitutionality is questionable.'" On the contrary, it seems that the Court is of the opinion that nonjudicial punishment is constitutional, since the Judges recommend enactment of the recent Article 15 legislation while it was pending before Congress.¹¹²

In addition to the Court of Military Appeals, the American Legion, the Association of the Bar of the City of New York, the New York County Lawyers Association, the American Veteran's Committee, the Judge Advocate's Association, and the American Bar Association endorsed the legislation to increase commanders' nonjudicial punishment powers.'" Endorsement of the legislation by these organizations lends added weight to an argument that

¹¹¹ *E.g.*, *United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960); *United States v. Owens*, 11 U.S.C.M.A. 240, 29 C.M.R. 56 (1960).

¹¹² *Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4943 (1962).

¹¹³ *Id.* at 4943-4944.

nonjudicial punishment is a proper exercise of Congress' war power.

In summary, statutory authority to impose nonjudicial punishment has been in existence for nearly fifty years and was preceded by a custom whereby it was imposed without such authority. During the period from 1775 to the present day, this means of improving and maintaining discipline has proved its value."¹¹⁴ That it would be held unconstitutional after having been in use for more than one hundred eighty-eight years is unlikely.

IV. ARTICLE 15 AS AMENDED

A. OFFENSES PUNISHABLE: WHAT IS MINOR?

The new Article 15 provides, as did its statutory predecessors, that commanding officers may impose the punishments authorized for "minor offenses."¹¹⁵ The term "minor offenses" is not defined in the present statute and was not defined in any of the previous statutes.¹¹⁶ A search of Senate and House Reports and Committee Hearings concerning the present and past legislation affecting nonjudicial punishment reveals that the "limits" of the term have never been adequately specified by Congress.

The definition of this term is of critical importance because a commanding officer does not have authority to impose nonjudicial punishment unless the offense concerned is minor."¹¹⁷ The accused person is affected because the defense of "former punishment under Article 15"¹¹⁸ is not available if the offense for which he was punished is not minor." Although whether an offense is "minor" is initially determined by the officer imposing the punishment, a superior commander may disagree with that determination and order the offender tried, in which case the question whether the offense is "minor" is usually placed in issue (by the accused) at the trial by a motion to dismiss because of "former

¹¹⁴ H.R. REP. No. 1612, *supra* note 84, at 2.

¹¹⁵ UCMJ art. 15(b).

¹¹⁶ AW 1916, art. 104; AW 1920, art. 104; AW 1949, art. 104.

¹¹⁷ Punishment imposed for an offense which *is* "minor" constitutes a bar to subsequent trial for the same offense. If the offense is *not* "minor," nonjudicial punishment imposed for the offense will not bar subsequent trial and punishment for the same offense. See UCMJ art. 15(f).

¹¹⁸ The defense of former punishment should not be confused with the defense of former jeopardy which is applicable to prior *judicial* proceedings. *United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960).

¹¹⁹ *E.g.*, *United States v. Fretwell*, *supra* note 118; *United States v. Harding*, 11 U.S.C.M.A. 674, 29 C.M.R. 490 (1960).

punishment.” It **seems** apparent that the intention of Congress with regard to the new Article **15** was to broaden the term “minor offenses.” In hearings before a Subcommittee of the House Committee on Armed Services, the following comments concerning this intent were made:

Mr. Wilson. . . . But what I am disturbed about, in looking at the suggested amendments and changes in this act, is there doesn't seem to be any change in the definition of misdemeanor or the severity of the breach of discipline, that is brought before the commanding officer. There seems to be no change.

Mr. Blanford. Yes. May I discuss that with you, Mr. Wilson?

Mr. Wilson. Yes.

Mr. Blanford. *You put your finger on the main purpose of this bill.*
. . . . [Emphasis added.]¹²⁰

That may have been the main purpose of the bill, but the Subcommittee neglected to provide a specific definition of the term “minor offense.”

Since Congress has never provided a definition of “minor offense” the term has historically been defined by the services themselves. To provide a better understanding of the term, it is necessary to go back into history and trace the development of “minor offense” from the first disciplinary punishment *statute* to the present Article **15**.

In testifying before the House Military Affairs Committee in **1912** concerning revision of the Articles of War, the Judge Advocate General of the Army made the following remarks concerning minor offenses:

The Chairman. General, what is the character of offenses, by way of illustration?

Gen. Crowder. A soldier is absent from fatigue; he is boisterous in quarters; he fails to salute an **officer**.¹²¹

Other than that reference to “minor offense” no attempt was made to spell out what the term included.

The Army operated from **1916** to **1921** without a definition of “minor offense” since the **1917** Manual did not attempt to define the term.¹²² In the **1921** Manual, “minor offense” was defined as “any offense committed by any *enlisted man* . . . which would ordinarily be disposed of by summary court-martial. . . . [Emphasis added.]”¹²³ In **1928**, a more specific definition was furnished Army commanders:

¹²⁰ *Hearings on H.R. 7656*, *supra* note 112, at 4954.

¹²¹ *Hearings on H.R. 23628 Before the House Committee on Military Affairs*, 62d Cong., 2d Sess. 113 (1912).

¹²² Manual for Courts-Martial, United States Army, 1917, para. 333.

¹²³ Manual for Courts-Martial, United States Army, 1921, para. 333.

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Whether or not an offense may be considered as "minor" depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking, the term includes derelictions not involving moral turpitude or any greater degree of criminality or seriousness than is involved in the average offense tried by summary court-martial. An offense for which the Articles of War prescribe a mandatory punishment or authorize the death penalty or penitentiary confinement is not a minor offense.¹²⁴

This definition did not provide an answer in all cases. The commander still had to "guess" concerning many offenses that could occur from day to day. However, a rule soon developed that whether an offense is minor—within the meaning of the statute—was a question of fact for decision by the officer administering the punishment, and in the absence of abuse of discretion, his decision is final and conclusive.¹²⁵

This did not entirely solve the commander's dilemma, for in the absence of specific criteria he could not predict with certainty whether he was abusing his discretion. Board of Review decisions were of assistance to the commander in some cases. Applying the Manual definition, the Board held that such offenses as embezzlement and drunk and disorderly in uniform in a public place (when charged as conduct unbecoming an officer and gentleman) were not minor,¹²⁶ and that breaking restriction, simple assault and battery, and drunk and disorderly (charged as such and not as conduct unbecoming an officer and gentleman) were minor.¹²⁷

The definition of "minor offense" was changed slightly in 1949, and a few changes were made following enactment of the *Uniform Code of Military Justice* in 1950. The 1951 Manual provided:

Whether an offense may be considered "minor" depends upon its nature, the time and place of its commission, and the person committing it. Generally speaking the term includes misconduct not involving moral turpitude or any greater degree of criminality than is involved in the average offense tried by summary court-martial. An offense for which the punitive article authorizes the death penalty or for which the confinement for one year or more is authorized is not a minor offense. Offenses such as larceny, forgery, maiming, and the like involve moral turpitude and are not to be treated as minor. Escape from confinement, willful disobedience of a noncommissioned officer or petty officer, and protracted absence without leave are offenses which are more serious

¹²⁴ Manual for Courts-Martial, United States Army, 1928, para. 105.

¹²⁵ CM 204275, Lichtenfels, 7 B.R. 395 (1936).

¹²⁶ CM 242900, Pond, 27 B.R. 209 (1943) (drunk & disorderly); CM 213993, Casseday, 10 B.R. 297 (1940) (embezzlement).

¹²⁷ CM 250912, Wells, 33 B.R. 91 (1944) (assault & battery); CM 22.0890, Pagan, 13 B.R. 99 (1942) (breaking restriction); CM 204275, Lichtenfels, 7 B.R. 395 (1936) (drunk & disorderly).

than the average offense tried by summary courts-martial and should not ordinarily be treated as minor.”

The only significant change from the 1928 Manual definition was the inclusion of certain specific offenses that were not ordinarily tried by summary court-martial.

In determining whether an offense was minor, in cases in which the defense of former punishment was raised, the Boards of Review and the Court of Military Appeals have applied the various tests set forth in the 1951 Manual provision. In one case involving a violation of parole, the Board held that the offense was not minor, placing emphasis on the “person committing the offense” test (the accused had three previous convictions).¹²⁹ In another case, the Court used several of the “measuring rods” contained in the Manual definition and determined that the assault and battery in question was not a minor offense.’”

In the *Fretwell* case,” the Manual provision was challenged in a dissenting opinion by Judge Ferguson. That case involved a Navy officer tried by general court-martial for being drunk on duty as officer-of-the-deck on an aircraft carrier that was in drydock. He had previously been punished under Article 15 and at his trial raised the defense of former punishment. In holding that the offense was not minor, the majority applied the standard Manual tests, including (a) the time and place of commission of the offense, (b) the person committing it, (c) the maximum punishment authorized for the offense, and (d) the degree of criminality involved.

In his dissenting opinion, Judge Ferguson termed the Manual provision illogical, and suggested that the proper method of determining whether an offense is minor or serious “involves no more than an examination of the statute creating the offense and the punishment authorized for it by the President. . . .”^{131,132} He also labeled illogical the Manual’s reference to the person committing the offense, saying that this “presumably means his status in the armed forces as an officer or enlisted man. Common sense immediately dictates that the duties performed by the latter are frequently more important militarily than those in which the former engage.”¹³³ Rather than make an *ad hoc* determination in each case

¹²⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 128b [the Manual, when unaffected by subsequent amendments, will be hereinafter cited as MCM, 1951, para. I.

¹²⁹ ACM-S 11145, Norton, 19 C.M.R. 872 (1953).

¹³⁰ United States v. Harding, 11 U.S.C.M.A. 674, 29 C.M.R. 490 (1960).

¹³¹ United States v. Fretwell, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960).

¹³² 11 U.S.C.M.A. at 382, 29 C.M.R. at 198.

¹³³ *Ibid.*

Judge Ferguson would "measure the degree of accused's misconduct in light of whether Congress sought to make [such] conduct felonious in enacting the statute involved or whether it attained that status from the punishment prescribed by the President."¹³⁴

The different approaches used by the Judges of the Court of Military Appeals and the different results reached by them suggests the dilemma confronting the commander and the military lawyer as they attempted to determine whether an offense was minor through the use of the 1951 Manual provision. That this dilemma still confronts them under the new Article 15 will soon be apparent.

Although, as previously noted, Congress apparently intended to broaden the category of offenses that could be punished under Article 15 when the recent legislation was enacted, they did not indicate just how far the commander's authority under the Article was to be extended. That it was to encompass some offenses normally tried by special courts-martial is apparent.¹³⁵ At the same time, it was not intended that nonjudicial punishment should be used in serious felony cases.¹³⁶ Rather, it was feared there might be some attempt to prevent trial of serious offenses by awarding nonjudicial punishment. That this was not intended is indicated by the following colloquy during hearings on the new Article:

Mr. Blanford. . . . One of the things you have to avoid is possible collusion. For example, say an individual commits a fairly serious crime, and if there is collusion he could be awarded, even as an officer, article 15 punishment.

Now, if he were awarded this Article 15 punishment and then a higher authority discovered that this was a much more serious crime, the law permits—

General Kuhfeld. A trial.

Mr. Blanford. A greater punishment to be awarded. . . .

General Kuhfeld. He may be tried.¹³⁷

Since it was apparently intended to increase the category of offenses which could be punished under Article 15, the Manual definition of "minor offenses" was changed to reflect this intent. The Manual now provides:

The term "offenses", as used in connection with the authority to impose disciplinary punishment under Article 15 for minor offenses, includes only those acts or omissions constituting offenses under the punitive articles of the Uniform Code of Military Justice. The nature of an offense, and the circumstances surrounding its commission, are among the factors which must be considered in determining whether or not it is minor in nature. Generally, the term includes misconduct not in-

¹³⁴ *Ibid.*

¹³⁵ *Hearings on H.R. 7656, supra* note 112, at 4928.

¹³⁶ *Id.* at 4923.

¹³⁷ *Ibid.*

volving any greater degree of criminality than is involved in the average offense tried by summary court-martial. The term “minor” ordinarily does not include misconduct of a kind which, if tried by general court-martial, could be punished by dishonorable discharge or confinement for more than one year.¹³⁸

In addition to the new Manual provision, the Army has promulgated a definition of “minor offenses.” That definition refers to the Manual provision and further provides:

Although the term “minor” ordinarily does not include misconduct of a type which, if tried by a general court-martial, could be punished by dishonorable discharge or confinement for *more than 1 year*, *this is not a hard fast rule*, and due regard to all the circumstances of the offense might indicate that action under Article 15 would be appropriate *even in a case falling within this category*. Violations of or failures to obey general orders or regulations may properly be considered as constituting minor offenses when the prohibited conduct is itself of a minor nature when considered apart from the fact that it is prohibited by a general order or regulation. [Emphasis added.]¹³⁹

To come to a clearer understanding of what a minor offense presently is, it is necessary to compare the present Manual and Army definitions to the previous Manual provision. This comparison will show that:

(a) the former criterion concerning the person committing the offense has been deleted;

(b) the former provision concerning “moral turpitude” has been dropped;

(c) The previous reference to offenses punishable by death as “not minor” has been omitted;

(d) The old provision referring to the degree of criminality involved in the average offense tried by summary court-martial has been retained;

(e) The former provision that “offenses punishable by confinement for one year or more” are “*not minor*” has been changed to provide that *ordinarily* misconduct of a type which if tried by a general court-martial authorizes a punishment of *dishonorable discharge* or confinement for *more than one year* is not minor; and

(f) the previous reference to consideration of the facts and circumstances surrounding the offense remains substantially unchanged.

The changes from the old Manual provision, the Manual’s use

¹³⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 128b (Addendum 1963). [Hereinafter the Manual, as amended by Exec. Order No. 11081, will be cited as MCM, 1951, para. (Addendum 1963).]

¹³⁹ Army Regs. No. 22-15, para. 3d (Nov. 20, 1963) (hereinafter cited as AR 22-15, para.).

of such language as "ordinarily," and the regulatory phrase "this is not a hard and fast rule," indicates the provisions of the present definitions are to be used as *general guidelines only*.¹⁴⁰

The present definitions suggest that (a) offenses normally tried by summary court-martial *are* minor; (b) those ordinarily tried by special court-martial, or for which a maximum punishment of less than dishonorable discharge or confinement for more than one year is authorized, may ordinarily be treated as minor; (c) offenses punishable by dishonorable discharge or confinement for more than one year, which are usually tried by general court-martial, are not *ordinarily* minor but this is not a hard and fast rule and all the facts and circumstances must be considered. It seems that the only offenses which could *never* be considered minor are those for which the Code prescribes a mandatory punishment—murder and spying.”

Having referred previously to the commander's dilemma in determining whether an offense is minor due to the lack of specific criteria in the definitions provided him, a discussion of what may happen once he has characterized an offense as minor and has imposed punishment for it seems appropriate. That his decision *may* be overturned by a superior commander or by the courts is suggested by the following discussion during hearings on the new Article:

Mr. Hardy. Now, how is the term "minor offenses" defined? Is it defined in the act?

General Kuhfeld. It is not defined in this act specifically, but it is defined in the manual.

Mr. Hardy. Well, where does the discretion for interpreting that term rest?

General Kuhfeld. *It rests primarily, Mr. Hardy, with the commander who has the right to impose a punishment.*

I say primarily because there have been several decisions of the Court of Military Appeals where it has been pointed out that considerable weight must be given to the determination of the officer who imposed the punishment that this is a minor offense.

For instance, a larceny, or the stealing of money over \$20, normally

¹⁴⁰ Military Justice, Trial Procedure, ch. XIII, p. 328 (Judge Adv. Gen. School Text, Jan. 1964).

¹⁴¹ *Id.* at 330. In testifying before a Subcommittee of the Senate Committee on Armed Services, Col. Gilbert G. Ackroyd, Chief, Military Justice Division, Office of the Judge Advocate General of the Army, said "if that individual commits an offense, and we might call it a minor offense in the sense that it is not a general court-martial offense" *Hearings on H.R. 11257 Before a Subcommittee of the Senate Committee on Armed Services*, 87th Cong., 2d Sess. 25 (1962). This indicates the Army considers the definitions of "minor offenses" to be general guidelines only,

is not considered a minor offense. But the circumstances may be such involving this particular case that it is a minor offense so far as the commander is concerned, and that that position is justified.

The Court of Military Appeals says considerable weight must be given to his determination.¹⁴²

Mr. Hardy. Now, that is the thing I was trying to understand. [Emphasis added.]¹⁴³

In addition, Article 15(f) provides that disciplinary punishment under the Article is not a bar to trial by court-martial for a serious crime or offense not properly punishable under the Article. It is evident, therefore, that the commander's decision can be overturned. However, it would seem that once he characterizes an offense as minor, his decision may only be set aside where he has abused his discretion in reaching that determination.

Under the present "minor offense" guidelines, a commanding officer, in determining whether an offense is minor, would theoretically consider all the facts and circumstances surrounding the offense, the degree of criminality involved in the offense, and the maximum punishment authorized for it. The Manual now indicates that consideration of the *person* committing the offense — his age, experience, intelligence, and prior disciplinary record — relates only to the determination of whether nonjudicial punishment should be used, not to whether the offense is minor.¹⁴⁴

As a practical matter, however, it would seem that a commander, in working with the non-specific definitions with which he has been provided, will find it difficult to divorce consideration of the *person* involved from his characterization of the offense as minor or serious. Most commanding officers will probably tend to be more liberal in classifying an offense as minor when the individual involved is a young, inexperienced soldier with no prior disciplinary offenses. This seems unavoidable. Larceny of fifty dollars from a company fund by a seventeen year old company clerk with an eighth grade education does not involve the same degree of criminality as would the same offense committed by the company commander who is thirty years old and a college graduate. The impact on discipline and morale is much greater in the case involving the latter. Disregarding the *person* com-

¹⁴² In referring to decisions of the Court of Military Appeals, Gen. Kuhfeld was apparently mistaken. However, there are previous board of review decisions providing that where a commanding officer, in exercising his discretion, elects to treat an offense as minor, in the absence of abuse of discretion, his decision is final and conclusive. See NCM 58-01699, Mahoney, 27 C.M.R. 898 (1959).

¹⁴³ *Hearings on H.R. 7656*, *supra* note 112, at 4920.

¹⁴⁴ MCM, 1951, para. 129b (Addendum 1963).

mitting the offense, therefore, although theoretically possible, is not practical from the commander's point of view.

Thus far, we have not considered the force and effect likely to be given to the new "minor offense" definitions by the Court of Military Appeals. The question whether those definitions will be accepted by the Court must be mentioned, in view of one Judge's reluctance to accept the previous Manual provision,¹⁴⁵ and in consideration of the fact that Article 15(a) does not grant *express* authority to either the President or the Secretaries to define the term.

The new Article 15, in providing for regulations implementing the Article to be promulgated by the President and the Secretary concerned, states:

Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. . . . If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.¹⁴⁶

With regard to the President's authority to define "minor offense," a Subcommittee of the House Armed Services Committee, in its hearings on the new Article, considered the old Manual provision and seemed to assume that the President would continue to define the term by executive order.¹⁴⁷ The same is not true of the Secretaries. In discussing the Secretaries' authority to issue regulations, it was said:

General Kuhfeld. . . . I think Mr. Finn pointed out why there shouldn't be any objection to the secretarial authority.

The Secretary can't increase anything, or can't go above the punishments or the limitations that would be set up in this bill.

All he could do is to put limitations or restrictions and explanations on the provisions that are carried in the bill itself.

Mr. Rivers. The only thing he can write is as a result of what is contained in the statute.

General Kuhfeld. That is right, sir. [Emphasis added.]

¹⁴⁵ *United States v. Fretwell*, 11 U.S.C.M.A. 377, 29 C.M.R. 193 (1960) (opinion of Ferguson, J.).

¹⁴⁶ UCMJ, art. 15(a).

¹⁴⁷ *Hearings on H.R. 7656*, *supra* note 112, at 4920-921.

¹⁴⁸ *Id.* at 4919.

During the Senate Hearings on the Article, the following discussion occurred concerning the same subject:

Senator Ervin. Let me ask one question right here. As I construe subsection (a) . . . the regulations at present are such that the respective Secretaries can place limitations or conditions under the statute, but that they cannot expand what can be done?

General Kuhfeld. That is absolutely right. There is no contemplation, and *it would be utterly illegal, for a Secretary to try to increase the authority of any commander of any kind.* [Emphasis added.]¹⁴⁹

Whether the Court of Military Appeals will accept the new Manual and Regulation definitions as having been promulgated by authority of Congress, and thus as having the force and effect of law, or merely consider them as “explanations” of what Congress probably intended by “minor offenses,” can only be determined when the question is presented to the Court for its decision.” However, as those definitions are flexible and “not hard and fast rule[s],”¹⁵¹ almost any offense can be considered “minor” within the meaning of the guidelines provided, depending on the circumstances. In considering the possible regulatory action under Article 15, Congress was primarily concerned lest the President and military authorities attempt to expand non-judicial punishment power to the *detriment* of the accused. The problem is therefore somewhat circular—so long as the courts accept punishment imposed under the broader “minor offense” concept as a bar to subsequent trial, then the broadened definition is a *benefit* to the accused. The broadened concept also seems to have been contemplated by Congress, and distinctly furthers Congress’ announced *remedial* purpose of the new legislation—*i.e.*, to promote correction and rehabilitation rather than punishment, and to preserve individual’s records free from unnecessary stigmatizations by criminal convictions.

B. WHO CAN IMPOSE PUNISHMENT UPON WHOM?

Article 15(b) provides that a commanding officer may impose the punishments authorized upon officers and other personnel of his command. The Article also provides for imposition of punishment by an “officer in charge” upon enlisted members assigned to

¹⁴⁹“Hearings on H.R. 11257, *supra* note 141, at 24.

¹⁵⁰ In CM 410099, *Rosenrons* (Oct. 30, 1963), a board of review applied the new Manual provision in determining whether an escape from confinement was “minor.” Considering the “attendant circumstances” it was determined that the offense was “not minor.” Under facts similar to those in *Rosenrons*, the board in CM 408756, *Cosme* (May 2, 1963), applied the old Manual provision and determined that escape from confinement was a “minor offense” within the meaning of Article 15.

¹⁵¹ AR 22-15, para. 3d.

the unit of which he is in charge.¹⁵² Disciplinary punishment authority under the Article is an attribute of command and therefore devolves upon an officer temporarily in command of a unit.¹⁵³ Formerly considered to include commissioned officers only,¹⁵⁴ "commanding officer" now includes both commissioned and warrant officers exercising command.¹⁵⁵

Although any commanding officer is authorized to exercise the disciplinary punishment power conferred upon him by the Article, Article 15(a) authorizes the President and the Secretary concerned to place limitations upon the powers granted by the Article with respect to the categories of commanding officers authorized to exercise those powers. Acting under this authority, the Secretary of the Army has authorized superior commanders exercising nonjudicial punishment powers to limit or withhold the exercise of disciplinary punishment powers by subordinate commanders.¹⁵⁶

¹⁵² The provision concerning "officer in charge" applies only to the Navy, Marine Corps, and the Coast Guard, and refers to a senior petty officer or noncommissioned officer in command. MCM, 1951, para. 128a (Addendum 1963); *Hearings on H.R. 7656, supra* note 112, at 4940-941.

¹⁵³ 1 BULL. JAG 24 (1942).

¹⁵⁴ 3 DIG. OPS. JAG, *Nonjud. Punish.* § 3.13 (Jan. 12, 1954).

¹⁵⁵ MCM, 1951, para. 128a (Addendum 1963); AR 22-15, para. 2a(1).

¹⁵⁶ AR 22-15, para. 2c. In addition to a complete withholding of disciplinary punishment power, superior commanders are authorized by the Regulations to withhold Article 15 authority over certain categories of personnel. However, withholding of authority to punish certain offenses, such as larceny or reckless driving, is not expressly authorized by the Regulations. *United States v. Hawthorne*, 7 U.S.C.M.A. 293, 22 C.M.R. 83 (1956), was concerned with a directive issued by a superior commander to the effect that repeat offenders should be eliminated from the service and that the preferred method for elimination was trial by general court-martial. The Court said such a directive deprived the accused's commander of his discretion to make an appropriate disposition of the case and that the directive ignored the Manual directive that charges are to be tried by the lowest court that has power to adjudge an appropriate punishment. AR 22-15, para. 6 provides that "nonjudicial punishment should be administered at the lowest level of command commensurate with the needs of discipline." In addition, the Manual provides that "no policy may be established whereby certain categories of offenses must be disposed of under Article 15 regardless of the circumstances, or predetermined kinds or amounts of punishments must be imposed for certain classifications of offenses that are proper for disposition under Article 15." MCM, 1951, para. 129a (Addendum 1963). Thus, withholding a subordinate commander's power to nonjudicially punish certain specific offenses would deprive that commander of his discretion to make an appropriate disposition of the offense and offender, would ignore the provisions of the Regulations requiring that nonjudicial punishment be administered at the lowest command level that has power to adjudge an appropriate punishment, and would seem to violate the *spirit* of the Manual provision prohibiting establishment of policies requiring certain categories of offenses to be punished under Article 15 or that certain punishments be imposed for certain offenses.

In the Army, a “command” includes a company or battery, numbered unit or detachment, mission, Army element of a unified command and joint task force, service school, area command, and, in general, any other organization of the types mentioned, the commander of which is looked to by superior authority as the individual primarily responsible for maintaining discipline in that organization.¹⁵⁷ Many officers in command of various organizations such as service schools and missions are not designated “commanding officer,” but are called (“commandant,” “chief of mission,” etc. However, it is not the description of the unit or the title of the officer in command that determines whether the commander has authority to impose disciplinary punishment, but whether the unit, and its commander, has the usual responsibilities and attributes of command.¹⁵⁸ Any military person “of the command” may be punished under Article 15 by his commanding officer.¹⁵⁹ This authority would subject all military personnel—officers, warrant officers, and enlisted men and women—to the punishment authority of a commander if they are of his command.” For this purpose, military persons are considered to be “of the command” when they are assigned, attached, detailed, or otherwise affiliated with the organization concerned under circumstances indicating that the commander is to exercise disciplinary authority over them.”

The troublesome area in determining whether a person is “of the command” involves those persons attached, detailed, or affiliated with an organization other than by assignment. In those cases, it is necessary to first look to the orders, if any, attaching or detailing the member to the organization concerned. If the orders provide “attached for administration,” “attached for rations, quarters, and administration,” or expressly provide that the individual is attached for “administration of military justice,” then the member concerned is considered to be a member of that command for disciplinary punishment purposes.¹⁶² However, when there are no written orders or when such orders are silent in this respect, it becomes necessary to look to such factors as where the member slept, ate, was paid, the duration of his status, the

¹⁵⁷ AR 22-15, para. 2a(2).

¹⁵⁸ 6 DIG. OPS. JAG, *Nonjud. Punish.* § 3.1 (Jan. 12, 1956).

¹⁵⁹ UCMJ art. 15(b).

¹⁶⁰ AR 22-15, para. 3a. Retired personnel not on active duty are not subject to the disciplinary punishment authority of local commanders. 7 DIG. OPS. JAG, *Courts-Martial* § 45.8 (June 29, 1956).

¹⁶¹ AR 22-15, para. 3a.

¹⁶² *Ibid.*

duty he performed, and any other similar matter that would indicate what his status is for this purpose.¹⁶³ Judge Advocates can take steps in *advance* to ensure that no confusion arises by the simple expedient of ensuring that all attaching orders contain some explicit statement with respect to disciplinary punishment authority over the member concerned.

As a member may be assigned to one organization and attached to another, he may be subject to the punishment authority of two commanding officers.¹⁶⁴ Under such circumstances, it would seem that some coordination between the two commanders would be necessary to assure that the offender is not twice subjected to punishment for the same offense and to assure that the necessary records of the punishment are properly filed. In the past, when an offender was subjected to the disciplinary authority of two commanders, the commander of the unit to which the offender was *assigned* customarily administered the punishment, if any. Continuation of that "custom" would, of course, avoid many of the problems encountered in circumstances where the offender is subject to the punishment authority of more than one commander. The two commanders each have legitimate interests in the matter, however—the attached unit commander in the state of discipline of his forces, and the assigned unit commander in his permanent personnel structure. Perhaps the best balancing of these interests would involve reserving to the latter all cases in which the appropriate punishment may permanently affect the member's status—particularly the punishment of reduction.

A commanding officer's authority to impose nonjudicial punishment upon a member of his command is terminated when that individual ceases to be a member of his command by reason of transfer or otherwise.¹⁶⁵ Although Article 15 proceedings have been initiated and the only remaining act is imposition of the punishment, a transfer of the offender to another command divests the commanding officer of his authority.¹⁶⁶ However, once the punishment is imposed, it seems that the punishment is legally effective notwithstanding the fact that the offender was transferred prior to receiving notification of the punishment.¹⁶⁷

¹⁶³ *Ibid.*

¹⁶⁴ 1 DIG. OPS. JAG, *Nonjud. Punish.* § 4.7 (April 30, 1952).

¹⁶⁵ AR 22-15 Para. 3b; 3 DIG. OPS. JAG, *Nonjud. Punish* § 4.6 (Oct. 6, 1956).

¹⁶⁶ *Ibid.*

¹⁶⁷ 6 DIG. OPS. JAG, *Nonjud. Punish.* § 4.6 (Sept. 28, 1956).

Prior to the recent amendmeht, disciplinary punishment authority could not be delegated.'" The amended Article expressly provides that an officer exercising general courts-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under the Article to a principle assistant if so authorized by the Secretary concerned.¹⁶⁹ A principal assistant to whom such power has been delegated may, depending upon the terms of the delegation, exercise the same authority as the officer delegating the power.¹⁷⁰ The commander delegating his disciplinary punishment authority would not, however, be divested of the right to act personally in any case in which he may desire to do so.¹⁷¹ Although the Article does not define "principal assistant," the Army has defined the term to mean an officer who exercises the functions of deputy or assistant commander.'" This appears to be the meaning Congress attached to "principal assistant."¹⁷³

C. PUNISHMENTS

The previous disciplinary punishment Article authorized the the punishments of reprimand, confinement (imposable upon enlisted personnel attached to or embarked on a vessel only), restriction, extra duties, reduction in grade, and forfeiture of pay (applicable to officers only).¹⁷⁴ In addition to extending the duration for which those punishments may be imposed, the new Article also authorizes the punishments of correctional custody, arrest in quarters, forfeiture of pay (applicable to all personnel), and detention of pay.¹⁷⁵ The punishment authority of senior commanders is now equivalent to that exercised by a summary court-martial.¹⁷⁶ The new punishments and some of the "old" ones that

¹⁶⁸ MCM, 1951, para. 128a.

¹⁶⁹ UCMJ art. 15(a).

¹⁷⁰ MCM, 1951, para. 128a (Addendum 1963). Once punishment has been imposed upon an offender by a principal assistant, the commander may act upon that case only by a way of a review and/or modification of the punishment. A modification of the punishment that would result in an increase in quantity or quality is prohibited.

¹⁷¹ AR 22-15, para. 2b.

¹⁷² *Ibid.* An executive officer is not a deputy or assistant commander for this purpose.

¹⁷³ *Heal-ings on H.R. 11257, supra* 141, at 28.

¹⁷⁴ UCMJ, 1950, art. 15(a).

¹⁷⁵ UCMJ art. 15(b).

¹⁷⁶ *That* Congress intended to increase the punishment power of senior commanders to that exercised by the summary court-martial cannot be seriously questioned. *Heal-ings on H.R. 11257, supra* note 141, at 9; *Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4929 (1962).

have undergone substantial changes in duration or scope will be discussed in order that the extent of the increase in commanders' punishment power may be more clearly understood and appreciated.

1. *correctional Custody.*

Correctional custody, a form of physical restraint, was apparently "borrowed" from the Canadian Army, following a study of that country's system of military discipline by Major General Charles L. Decker, former Judge Advocate General of the Army, for the so-called "Powell Committee."¹⁷⁷ Since this punishment is completely new to the nonjudicial punishment system, it will be discussed in detail.

Correctional custody is "the physical restraint of a person during duty or nonduty hours, or both, imposed as a punishment under Article 15, and may include extra duties, fatigue duties, or hard labor."¹⁷⁸ Although physical restraint is involved, this punishment is not confinement and should not be so considered.¹⁷⁹ The hearings conducted on the amended Article show that Congress intended that a person undergoing correctional custody should not be placed in a facility where he would be associated with prisoners confined as a result of court-martial sentence or those awaiting trial by court-martial. In addition, those hearings indicate that (a) when serving this punishment a member should continue to perform his duties with his unit, (b) that he should not be treated as a prisoner but in an entirely different manner, and (c) that the physical restraint imposed is not to be considered "time lost."¹⁸⁰ Army Regulations governing operation of correctional custody facilities provide, *inter alia*, that persons serving correctional custody will not be fingerprinted,¹⁸¹ "will not wear prisoner brassards,"¹⁸² and will not be employed, trained, or secured under armed guards.¹⁸³

An offender undergoing this punishment would not find the experience pleasant since it is provided that buildings used for cor-

¹⁷⁷ *Report to Hon. Wilbur M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army*, 25-56 (Jan. 18, 1960).

¹⁷⁸ MCM, 1951, para. 131c(4) (Addendum 1963).

¹⁷⁹ AR 22-16, para. 8c(2)(c).

¹⁸⁰ *Hearings on H.R. 7656*, *supra* note 176, at 4918.

¹⁸¹ Army Regs. No. 210-181, para. 9i (Sept. 24, 1957, as changed) [hereinafter cited as AR 210-181, para. 9i].

¹⁸² AR 210-181, para. 15a(4).

¹⁸³ AR 210-181, para. 37.1.

rectional custody facilities shall have the windows covered with heavy wire screening or other sturdy material to provide a physical barrier,¹⁸⁴ that the punishment shall be served in surroundings that are "austere and conducive to . . . rigorous and purposeful correction. . . ."¹⁸⁵ and that persons undergoing correctional custody may be required to perform extra duties, fatigue duties, or hard labor.¹⁸⁶

The amended Article authorizes commanders to impose correctional custody upon all enlisted persons. Field grade commanders are authorized, by the Article, to impose this punishment for a period not to exceed thirty days, and other commanders may impose correctional custody for a period not exceeding seven days. However, the Army has provided that correctional custody may only be imposed "by an officer exercising general court-martial jurisdiction, a general officer in command, or by a subordinate commander who has been granted this authority by an officer exercising general court-martial jurisdiction or a general officer in command."¹⁸⁷ The Army has also provided that enlisted personnel serving in pay grades above E-3, and female enlisted personnel, may not be subjected to correctional custody.¹⁸⁸ It must be noted, however, that an enlisted person may also be reduced in grade as a punishment under Article 15.¹⁸⁹ A person serving in pay grade E-4 could therefore be placed in correctional custody provided he is (at the same time) also reduced to pay grade E-3 or below.

¹⁸⁴ AR 210-181, para. 49a(5).

¹⁸⁵ AR 22-15, para. 8c(2)(d).

¹⁸⁶ MCM, 1951, para. 131c(4) (Addendum 1963). The distinction between extra duties, fatigue duties, and hard labor is not indicated in either the Article, the Manual or the Regulations. In fact, there seems to be no **real** distinction. Extra duties may consist of **any** duties customarily performed by the member concerned. Fatigue duties are generally considered to be the **more onerous** duties performed by enlisted personnel. Hard labor may apparently include **any** duty customarily performed by enlisted personnel, provided the labor involved has some useful purpose other than keeping the offender employed. Army Regs. No. 633-5, para. 17c(6) (Sept. 24, 1957, as changed). Since correctional custody may only be imposed upon those personnel in pay grades E-3 and below, and since most enlisted persons serving in those grades **normally** perform **all** the various manual and fatigue type duties (often on a roster type basis), extra duties, fatigue duties, and hard labor, when assigned incident to correctional custody, merely subject the offender to **more** of a given duty, fatigue or otherwise, than he would usually be required to perform.

¹⁸⁷ AR 22-15, para. 7a.

¹⁸⁸ *Ibid.*

¹⁸⁹ UCMJ Art. 15(b); MCM, 1951, para. 131c(7) (Addendum 1963); AR 22-15, para. 8e.

One of the most worthwhile features of correctional custody is the requirement that persons undergoing it will, when conditions reasonably permit, work and train with their units.¹⁹⁰ Thus, the individual being punished will usually remain an effective member of his unit, doing his share of the unit duties, while at the same time he serves a rather rigorous punishment. Moreover, administrative problems incident to enforcing this punishment should be reduced by this requirement since persons in the correctional custody facility could be fed at their units, thus removing a requirement for messing facilities as a part of the facility. In addition, there would seem to be no necessity for supervisory personnel at the facility during the hours the "inmates" are working with their units. This would free those personnel for other duties.

When correctional custody is served in a facility contiguous to a stockade facility¹⁹¹ that is not conveniently located geographically, it may be impracticable to require the member concerned to work and train with his unit. However, since one of the advantages of correctional custody is that it permits the offender to remain an effective member of his unit, it appears that it would be beneficial to the offender, and his unit, if the punishment were served in a facility maintained at battalion or company level.¹⁹²

If properly implemented, correctional custody should be an extremely effective punishment, since persons undergoing it may be subjected to many of the discomforts of "confinement" with none of the stigma attached to "prisoner status."

2. *Reduction in Grade.*

Although reduction of enlisted personnel for misconduct has been authorized for more than one hundred years,¹⁹³ it was first authorized by a disciplinary punishment statute in 1950.¹⁹⁴ Because of a lack of other effective punishment devices under the previous nonjudicial punishment statute, reduction in grade was extensively used as a means to correct and reform enlisted persons who committed minor offenses.¹⁹⁵

¹⁹⁰ AR 22-15, para. 8c(2) (f).

¹⁹¹ When imposed for a period in excess of seven days, correctional custody should be served at installation or comparable level under supervision of the provost marshal, using buildings adjacent to stockade facilities. AR 22-15, para. 8c(2) (b).

¹⁹² AR 22-15, para. 8c(2) (b), authorizes correctional custody, imposed for periods in excess of seven days, to be served in facilities maintained at battalion or company level when it would be impracticable to use an installation level facility due to the geographical distance involved or other factors.

¹⁹³ Army Regs. art. IX, para. 13 (1835).

¹⁹⁴ UCMJ, 1950, art. 15(a) (2) (d).

¹⁹⁵ Hearings on H.R. 7656, *supra* note 176, at 4909.

A reduction in grade is perhaps the most serious disciplinary punishment since it is continuing in nature. That is, the individual reduced suffers a loss of pay until he is again promoted to his former grade. The magnitude of this monetary loss can be appreciated when it is considered that it may take several years to regain that **grade**.¹⁹⁶ The seriousness of this punishment was one factor that influenced Congress to increase the commander's *other* punishment power under Article 15.¹⁹⁷ Congress believed that additional and expanded punishment authority would give commanders several effective punishment "tools" and that reliance upon reduction in grade would decrease.¹⁹⁸

Under the previous statute, a reduction could not exceed one grade."¹⁹⁹ Under the amended Article, however, enlisted personnel in pay grades E-4 and below may be reduced *one or more* grades, and those in pay grades above E-4 may be reduced *two grades*.²⁰⁰ Congress placed two limitations on this authority. First, the officer effecting the reduction, or an officer subordinate to him, must have authority to promote to the grade from which the enlisted person concerned is reduced, and secondly, officers below field rank may not reduce any enlisted member more than one grade.²⁰¹ The President further limited this punishment by providing that personnel in pay grades above E-4 will not be reduced more than one grade except during time of war or national emergency 'declared by Congress, and then only upon a determination by the Secretary concerned that the circumstances require it.²⁰²

The provision requiring promotion authority to the grade from which reduced does not refer to the authority to promote the individual concerned. Instead, it is considered to mean *general* authority to promote to the grade held by the member being punished,²⁰³ or to any higher grade."²⁰⁴ This construction of that statutory language is particularly important in the Army. Although commanders of regiments, battlegroups, and separate or detached battalions have authority to promote to pay grades E-5 through E-9,²⁰⁵ by practice they usually do not promote to those grades. Such promotions are ordinarily made at higher command levels

¹⁹⁶ *Zbid.*

¹⁹⁷ *Zbid.*

¹⁹⁸ *Zbid.*

¹⁹⁹ UCMJ, 1950, art. 15(a) (2)(D).

²⁰⁰ UCMJ art. 15(b).

²⁰¹ *Zbid.*

²⁰² MCM, 1951, para. 131b(2)(B) (iv) (Addendum 1963).

²⁰³ MCM, 1951, para. 131c(7) (Addendum 1963).

²⁰⁴ AR 22-15, para. 8e(1).

²⁰⁵ Army Regs. No. 624-200, para. 3(2) (July 3, 1962, as changed),

due to the limited number of vacancies available in those grades. Since these senior commanders do not actually promote to those grades, this interpretation of the meaning of "promotion authority" enables them to make use of the reduction authority under Article 15, although in practice the *actual* authority to promote is withheld from them.²⁰⁸ The previous disciplinary punishment statute contained similar language requiring authority to promote in order to reduce," and a similar construction was placed upon that provision.²⁰⁸

The statutory limitation upon reduction authority by the requirement that the officer imposing the reduction must have authority to "promote" to the grade from which the individual concerned has been reduced poses a special problem in the Army with respect to reduction of personnel serving in pay grade E-2. In the Army, "advancement" to that pay grade is automatic upon the completion of four months service,²⁰⁹ provided the member concerned is in an "appointable status."²¹⁰ Thus, Army commanders do not have authority to "promote" to pay grade E-2 and it would seem, therefore, that such commanders do not have authority to reduce an enlisted person serving in that grade. In addition to an apparent lack of promotion authority, a reduction from pay grade E-2 to E-1 would previously have been ineffective. The member reduced would immediately and automatically be reappointed to E-2 because Article 15 punishment was not a factor that would suspend his "appointment status."²¹¹

Reduction to the lowest enlisted pay grade was contemplated by Congress, however, since it expressly provided that an officer in the grade of major or higher could reduce a person serving in pay grade E-4 or below to the *lowest* or any intermediate pay grade."

²⁰⁸ Prior to its change after the effective date of the new Article 15, Army Regs. No. 624-200, para. 31b (July 3, 1962) provided that a noncommissioned officer or specialist could not be reduced by an officer with grade below major. Thus, although a company commander had promotion authority to pay grade E-4, he could not reduce a noncommissioned officer or specialist in that pay grade except in the rare case where a major was in command of a company. Now, promotion authority alone, regardless of the grade in which the commander is serving, authorizes the commander to reduce enlisted persons in pay grade E-4 and below. AR 22-15, para. 8c(1).

"UCMJ, 1950, art. 15.

²⁰⁸ 8 DIG. OPS. JAG, *Enlisted Men* § 45.3 (Jan. 20, 1959).

²⁰⁹ Army Regs. No. 624-200, para. 20a (July 3, 1962, as changed).

²¹⁰ A member is not in an appointable status when he is in confinement, absent without leave, undergoing a court-martial sentence, etc. Army Regs. No. 624-200, para. 6 (July 3, 1962, as changed).

²¹¹ *Ibid.*

²¹² UCMJ art. 15(b)(2)(H)(iv).

The Secretary of the Army has resolved this dilemma by providing, in regard to reductions' in grade, that a commanding officer has ('promotion authority" *within the meaning of Article 15* if he has "the general authority to appoint to the grade from which reduced *or any higher grade.*" [Emphasis added.]²¹³ The Secretarial Regulations pertaining to "appointable status" have also been changed and now provide that a person undergoing any punishment under Article 15 is *not* in an "appointable status" while he is serving the punishment or any suspension thereof."

As a result of Congress' consent to the reduction of enlisted personnel to the lowest enlisted pay grade, the regulatory provision providing that a commander has promotional authority within the meaning of Article 15 if he has general authority to promote to the grade from which reduced *or any higher grade*, and the fact that nonjudicial punishment will now act to remove an individual from an ('appointable status," Army commanders may now impose a reduction upon personnel serving in pay grade E-2.

Under the enlisted grade structures used by the Army, both specialists and noncommissioned officer grades are authorized for pay grades E-4 through E-9, depending upon the military occupational specialty (MOS) of the individual concerned.²¹⁵ Since a certain MOS may authorize a specialist grade but not a noncommissioned officer grade in, for example, pay grade E-4, a problem is sometimes encountered in effecting a reduction to a lower grade. The problem cannot be avoided by reducing the individual from a noncommissioned officer grade to a lower specialist grade, or the reverse as the case may be, in order that his reduced grade will "fit" the requirements of his MOS. A noncommissioned officer may not be reduced to a specialist under Article 15 and neither may a

²¹³ AR 22-15, para. 8e(1).

²¹⁴ Army Regs. No. 624,200, para. 6h (July 3, 1962, as changed). It appears that "any" punishment would exclude an *executed* reduction, since, if a member were considered to be "undergoing punishment" merely by *being* in a reduced status (after imposition of the reduction) he would never regain "appointable status." Thus, this would be a circular process permanently freezing the offender in the grade to which reduced—since he never regains "appointable status" he would never be advanced and since he could not advance, he would remain in the reduced grade indefinitely. Therefore, "any punishment," for the purposes of para. 6h, would not include an *executed* reduction. However, if any punishment is imposed *in addition* to an executed reduction in grade, the individual punished would not regain "appointable status" until the additional punishment is served. Thus, the advancement of an enlisted person reduced to pay grade E-1 would be delayed until such time as the punishment is completed, thereby rendering an immediate readvancement to E-2 impossible.

²¹⁵ Army Regs. No. 611-201, § III (June 15, 1960, as changed).

specialist be reduced to a noncommissioned officer grade.²¹⁶ If a change from a noncommissioned officer grade to a specialist grade, or vice versa, is necessary because of a member's MOS, the change must be accomplished administratively. It cannot be accomplished as a punishment under Article 15.

Congress' concern with the seriousness of a reduction in grade as a disciplinary punishment led to a broad statutory authority to suspend and mitigate such punishment.²¹⁷ Previously, a reduction in grade could not be suspended or vacated since it was effective immediately upon imposition.²¹⁸ The amended Article expressly provides that a reduction in grade, even if executed, may be suspended or mitigated to a forfeiture or detention of pay.²¹⁹ Congress obviously intended to preclude an application of the previous attitude toward suspension or mitigation of a reduction in grade.²²⁰

Reduction in grade will probably continue to be a frequently used punishment under Article 15. However, use of this punishment has, as a matter of policy, been discouraged.²²¹ This policy, and the availability of other effective punishments, should result in a substantial decrease in Article 15 reductions. Where senior noncommissioned officers and specialists are concerned, it would seem that reduction in grade should be imposed only when *absolutely* necessary to meet the needs of discipline or 'when other punishments have been tried and have failed to correct the offender.

3. *Extra Duties.*

Extra duties, a punishment imposable upon enlisted personnel only, is not new to the Army. It has apparently been in use for at least one hundred years.²²² However, the duration for which it may now be imposed, and the nature of the duties that may be involved, merit a brief discussion of this punishment.

Prior to the recent amendment, Article 15 limited the imposition of extra duty to a period of two hours a day for not more than fourteen days. The previous Article's failure to mention fatigue duties indicated that such duties could not be assigned, since the

²¹⁶ AR 22-15, para. 8e(2).

²¹⁷ *Hearings on H.R. 7656, supra* note 176, at 4911.

²¹⁸ Ms. Comp. Gen. B-131093 (June 12, 1957).

²¹⁹ UCMJ art. 15(d).

²²⁰ *Hearings on H.R. 11257 Before a Subcommittee of the Senate Committee on Armed Services*, 87th Cong., 2d Sess. 7 (1962); *Hearings on H.R. 7656, supra* note 176, at 4947-948.

²²¹ MCM, 1951, para. 131c(7) (Addendum 1963).

²²² BILLINGS, HARDTACK AND COFFEE 145 (1888).

older disciplinary punishment Articles had expressly provided for fatigue duties.”

That extra duties may include fatigue duties is expressly stated in the amended Article.”²²⁴ In addition, the period for which the punishment may be imposed has been extended to forty five days, when imposed by an officer of field rank.²²⁵ Company grade commanders are still limited to a maximum of fourteen days.²²⁶ The previous limitation to two hours *per* day has been omitted from the new Article.²²⁷ Thus, this punishment may now be imposed for *any number of hours during the day*.

The term “extra duties” implies that it would extend to duties above and beyond one’s normal duties, and it has been so defined by the President.²²⁸ The Army, however, has authorized extra duties “to be performed at any time and, within the duration of the punishment, for any length of time.”²²⁹ Therefore, it would seem that extra duties, in the Army, may be performed *in lieu* of normal duties. Although this would not appear to conflict with the new Article, it does seem to be something other than “extra duties” as defined by the President.

Although the duties assigned an offender undergoing this punishment may theoretically include *any* military duty, the “old” requirement that the duty assigned must not demean the grade or position held by the offender²³⁰ has been retained.²³¹ With a few exceptions, however, any military duty customarily performed by a person of the grade occupied by the accused may be assigned *as* an extra duty. Any duty which would constitute a cruel and unusual punishment not sanctioned by the customs of the service, or duty involving use of the offender *as* a personal servant, is prohibited as punishment under Article 15.²³² Any requirement that the duty assigned be performed in a ridiculous or unnecessarily degrading manner has also been forbidden.²³³

The punishment of extra duties, involving kitchen police duty (KP), for instance, may be imposed for a period of forty five

²²³ AW 1949, art. 104; AW 1920, art. 104; AW 1916, art. 104.

²²⁴ UCMJ art. 15(b).

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ MCM, 1951, para. 131c(6) (Addendum 1963).

²²⁹ AR 22-15, para. 8d.

²³⁰ MGM, 1951, para. 131b(2)(b); 6 DTG. OPS. JAG, Nonjud. Punish. § 11.1 (March 29, 1956).

²³¹ MCM, 1951, para. 131c(6) (Addendum 1963); AR 22-15, para. 8d.

²³² AR 22-15, para. 8d.

²³³ *Ibid.*

days under the new Article 15. Whether this would "correct, educate, and reform" the offender may be questionable, but *as* anyone who has performed KP duty would agree, while serving the punishment, the offender would surely wish he had not committed the offense for which it was imposed.

4. *Forfeiture of Pay.*

Under the previous disciplinary punishment statute, a forfeiture of pay could be imposed upon officers only.²³⁵ However, that limitation has been omitted from the new Article, which expressly provides that a forfeiture of pay may be imposed upon all military personnel.²³⁵

The authority to impose a forfeiture of pay upon an officer may only be exercised by officers exercising general court-martial jurisdiction or commanders of general or flag rank.²³⁶ However, any commanding officer may impose a forfeiture upon enlisted personnel.²³⁷ When imposed upon an officer, the maximum forfeiture that may be assessed is one half of one month's pay for two months.²³⁸ As to enlisted persons, a like amount may be forfeited if the officer imposing the punishment is in the grade of major or higher.²³⁹ If the commander administering the punishment is below the grade of major, the maximum forfeiture imposable is seven days pay.²⁴⁰

The only pay subject to forfeiture under Article 15 is basic pay and pay for sea or foreign duty.²⁴¹ Special pay, proficiency pay, quarters and subsistence allowances, and compensation of a similar nature must be excluded from an offender's pay in determining that pay subject to forfeiture.²⁴² If an enlisted person is required by law to make a monthly contribution from his pay to entitle his dependents to receive a basic allowance for quarters,²⁴³ the amount of that contribution must be deducted from his basic pay before the net amount of such pay subject to forfeiture may

²³⁴ UCMJ, 1950, art. 15.

²³⁵ UCMJ art. 15(b).

²³⁶ UCMJ art. 15(b)(1)(B)(ii).

²³⁷ UCMJ Art. 15(b)(2).

²³⁸ UCMJ art. 15(b)(1)(B)(ii).

²³⁹ UCMJ art. 15(b)(2)(H).

²⁴⁰ UCMJ art. 15(b)(2)(C).

²⁴¹ MCM, 1951, para. 131c(8) (Addendum 1963). This limitation to basic pay is traditional in the Army. See 1 *BULL JAG* 366 (Dec. 19, 1942).

²⁴² *Ibid.*

²⁴³ At the present time, only enlisted persons in pay grade **E-4** (with less than four years service) and below are required to make such a contribution. Act of July 10, 1962, 76 Stat. 152 (1962).

be computed.'" In the event a forfeiture of pay is combined in the same punishment with a reduction in pay grade, the forfeiture is limited to that authorized for the reduced grade.'" This limitation also applies if the reduction in grade is suspended.²⁴⁶ As a forfeiture of pay involves a permanent loss of entitlement to that pay forfeited, it may not extend to pay accrued before the forfeiture was imposed.²⁴⁷

5. *Detention of Pay.*

Unlike a forfeiture of pay, which represents a permanent loss of entitlement to the pay forfeited, a detention involves only, a temporary withholding of pay.'" This punishment, which was not authorized under previous disciplinary punishment statutes, may now be imposed upon any military person.²⁴⁸

With regard to officers, detention of pay may be imposed by officers exercising general court-martial jurisdiction or commanders of general or flag rank only, and is limited to one half of one month's pay per month for three months.²⁵⁰ The same amount of an enlisted person's pay is subject to detention provided the officer imposing the punishment is in the grade of major or higher, but is limited to fourteen days pay when imposed by other commanders.²⁵¹ As was the case with forfeiture of pay, only basic pay and pay for sea or foreign duty is subject to detention."

Since pay that has been detained is only withheld temporarily, it must be returned to the offender at some future date. Although the period for which the pay will be withheld may generally be determined by the commander imposing the punishment, Congress has provided that the period of detention must be for a stated period of not more than one year or the expiration of the offender's term of service, whichever occurs first.²⁵³

²⁴⁴ MCM, 1951, para. 131c(8) (Addendum 1963). Should an enlisted man not required to contribute to a basic allowance for quarters be reduced to a grade requiring such a contribution, the amount of such contribution must be deducted from his basic pay in determining that portion of his pay subject to forfeiture. AR 22-15, para. 8f(1).

²⁴⁵ MCM, 1951, para. 131c(8) (Addendum 1963).

²⁴⁶ AR 22-15, para. 8f(3).

²⁴⁷ MCM, 1951, para. 131c(8) (Addendum 1963).

²⁴⁸ MCM, 1951, para. 131c(9) (Addendum 1963).

²⁴⁹ UCMJ art. 15(b).

²⁵⁰ UCMJ art. 15(b)(1)(B)(iv).

²⁵¹ UCMJ art. 15(b)(2).

²⁵² MCM, 1951, para. 131c(9) (Addendum 1963).

²⁵³ UCMJ art. 15(b).

6. Punishments Involving Moral Restraint.

a. *Arrest in Quarters.* The amended Article authorizes the imposition of arrest in quarters upon officer personnel for a period of not more than thirty consecutive days.²⁵⁴ This punishment may only be imposed by an officer exercising general court-martial jurisdiction, or an officer of general or flag rank in command.²⁵⁵ A form of deprivation of liberty, arrest in quarters involves a moral restriction to certain defined limits.²⁵⁶ The term used—"arrest in quarters"—would seem to imply that those limits would be to the offender's quarters—his military residence, tent, state-room, or a private residence.²⁵⁷

However, the limits of the arrest are not required to be the offender's quarters. In discussing this punishment, the Manual says, "an officer so punished is required to remain within his quarters during the period of punishment *unless the limits of his arrest are otherwise extended. . . .*" [Emphasis added.]²⁵⁸ This provision intimates that the arrests may be less restrictive than "in quarters." That the officer undergoing the punishment may be required to perform duties²⁵⁹ also indicates that less restrictive limits than "quarters" may be authorized.²⁶⁰

b. *Restriction.* Like arrest in quarters, restriction is a form of moral restraint to certain specified limits.²⁶¹ This punishment may be imposed upon all military personnel by any commanding officer. Restriction for a period of not more than thirty days may be imposed upon an officer by any commander, and up to sixty days

²⁵⁴ UCMJ art. 15(b)(1)(B)(i).

²⁵⁵ *Ibid.*

²⁵⁶ MCM, 1951, para. 131c(3) (Addendum 1963).

²⁵⁷ *Zbid.*

²⁵⁸ *Zbid.*

²⁵⁹ *Ibid.*

²⁶⁰ An officer undergoing this punishment may not be assigned duties involving the exercise of command. Should the offender be assigned such duties by an authority having knowledge of his status of arrest in quarters, the arrest is thereby terminated. AR 22-16, para. 8b. Although arrest in quarters may only be imposed by an officer exercising general court-martial jurisdiction or by a general officer in command, the punishment may be terminated by any authority having knowledge of the offender's status of arrest in quarters. Thus, a company commander could set aside a punishment imposed by a general officer. The previous Regulations provided that if the member undergoing arrest in quarters was placed on any duty involving the exercise of command "by the authority *who imposed this form of punishment or by superior authority*, his status of arrest in quarters is thereby terminated." [Emphasis added.] Army Regs. No. 22-15, para. 8b (Feb. 1, 1963). That language limiting the authority to terminate an arrest in quarters to the officer who imposed the punishment, or superior authority, was apparently inadvertently omitted when the Regulations were reissued on Nov. 20, 1963.

²⁶¹ MCM, 1951, para. 131c(2) (Addendum 1963).

may be imposed by officers exercising general court-martial jurisdiction or commanders of general or flag rank.²⁶² With regard to enlisted personnel, a commander in the grade of major or higher may impose restriction for sixty days and other commanders may impose this punishment for not more than fourteen days.²⁶³ Restriction may include suspension from duty if so indicated by the commander imposing it.²⁶⁴ A suspension from duty, under these circumstances, deprives the member concerned of authority to exercise military command.²⁶⁵

No guidelines have been provided concerning the geographical limits that may be specified when this punishment is imposed. However, it is expressly provided that the geographical limits may be changed by the commander imposing the punishment, his successor in command, or by superior authority, provided that the limits of restriction, as changed, are not more restrictive than the limits initially imposed.²⁶⁶

Under the previous Article, Army commanders frequently required an offender undergoing restriction to report, at specified intervals, to a designated place or person.²⁶⁷ Apparently, the purpose of this practice was to assure that the offender did not go beyond the limits of his restriction, although it could conceivably be used as a device to harass the person concerned. Whatever its initial purpose, the practice has now been sanctioned by the Manual *provided* it is considered reasonably necessary to ensure that the punishment is being properly executed.²⁶⁸

c. *Arrest in Quarters or Restriction: Is There a Difference?* It is evident that these two punishments are similar in several respects. For example, the restraint involved in both is moral rather than physical, the geographical limits of both may be specified by the commander imposing the punishment, and the offender cannot exercise military command when in arrest or when expressly suspended from duty in connection with a restriction. The difficulty, however, is not in ascertaining the similarities, but in determining the differences. Both punishments include the characteristics men-

²⁶² UCMJ art. 15(b).

²⁶³ *Ibid.* Neither the committee hearings on the amended Article, the Manual, nor the Regulations indicate why a commander below the grade of major may impose thirty days' restriction upon an officer but **only fourteen** days upon enlisted personnel.

²⁶⁴ AR 22-15, para. 8a.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ This conclusion is based on this writer's observations and inquiries over a period of more than seven years in assignments which involved supervision of the administration of military justice, including nonjudicial punishment.

²⁶⁸ MCM, 1951, para. 131c(2) (Addendum 1963).

tioned, but there must be some distinction between the two or Congress would not have placed them in separate categories in the amended Article.

One immediately suspects that since the maximum period for which arrest in quarters may be imposed is thirty days, as opposed to sixty days for restriction, the geographical limits of the former were intended to be more restrictive than the limits of the latter. If this were not the case, an offender could, in effect, be placed in arrest in quarters for twice the maximum period authorized merely by designating the punishment as "restriction to the limits of his quarters," rather than "arrest." Although one may "suspect" the legality of such a procedure, neither the amended Article, the Manual, nor the Regulations expressly prohibit designation of an offender's quarters as the limits of his restriction.

The Manual, in speaking of the forms of punishment involving deprivation of liberty (including, *inter alia* arrest in quarters and restriction), provides that restriction is the least severe form.²⁸⁹ Since restriction is the least severe of the two, and as the maximum duration for which arrest may be imposed is only half that of restriction, one may, by analogy, conclude that a restriction "to quarters" would not be lawful since the punishment would then be the same as an arrest in quarters.

Although the Manual states that restriction is the least severe form of deprivation of liberty, that is not true under all circumstances. The following hypothetical situations involving two officers living in off-post residences will illustrate beyond question that restriction is not always the least severe form of deprivation of liberty.

One of the officers is placed in arrest in quarters. For thirty days, he enjoys the company of his wife, children, and friends. He watches his favorite shows in "living color" on his television set located in his comfortable bedroom. He relaxes in the quiet atmosphere of his recreation room in the basement of his home, complete with billiards and table tennis. He dines three times daily on homecooked meals prepared to his taste. His career and future promotions have been affected by the fact that he was punished. Otherwise, his "ordeal" could hardly be described as distressing.

The other officer is restricted to the limits of the post for sixty days. His career and future promotions have likewise been affected. However, he does not enjoy the company of his wife, children, and

²⁸⁹ MCM, 1951, para. 131c(2) (Addendum 1963).

friends in the warm, friendly surroundings of his own home. He cannot watch his favorite television programs in “living color” in the privacy of his own bedroom. He walks to the “club” to eat his meals, a distance of one mile, since his wife must keep the family car. His wife and children are subjected to embarrassment when neighbors inquire as to why he has not been home in several weeks. For further harrassment, his commanding officer refuses to assign him a room in which to sleep, thus requiring him to sleep on a cot placed in his office for that purpose.

Under the circumstances set forth, it would be silly to consider restriction the least severe form of deprivation of liberty.

This discussion is not intended to suggest that many military commanders will be searching for ways and means to make the punishments authorized more severe than intended, or to unduly harass those who offend against good order and discipline. Nevertheless, the amended Article seems to need further implementation with respect to these two punishments. Specific minimum geographic limits with regard to restriction should be included in the present Regulations to prevent restriction and arrest in quarters from becoming one and the same thing, and to prevent other inequities that may be encountered due to lack of sufficient guidelines with regard to this problem area.

D. COMBINATION OF PUNISHMENTS

Statutory authority to combine the various punishments²⁷⁰ represents a major change from the previous disciplinary Article and is a further manifestation that Congress intended to equate the commander’s punishment authority with that which may be imposed by a summary court-martial. Although combination of punishments was authorized by the 1948 Articles of War,²⁷¹ this authority was eliminated when the Uniform Code was enacted.²⁷²

To present a clear picture of how combinations may be effected, it is necessary to divide the punishments into three types or categories. The first category comprises punishments involving deprivation of liberty, including confinement, correctional custody, extra duties, arrest in quarters, and restriction. The second type of punishment involves deprivation of pay, including forfeiture and detention of pay. The last category is a general category encompassing all the remaining punishments—reprimand and/or admonition and reduction in grade.

²⁷⁰ UCMJ art. 15(b).

²⁷¹ A W 1948, art. 104.

²⁷² UCMJ, 1950, art. 15.

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Any or all of the punishments in the latter category may be combined with a punishment involving deprivation of pay.²⁷³ Thus, a punishment including reprimand, reduction, restriction, and forfeiture of pay would be lawful. The problem area, however, is not combination of punishments from different categories but combinations within the same category.

In the Army, the punishments authorized under Article 15(b) may be combined with these exceptions:

No two or more punishments involving deprivation of liberty may be combined to run either consecutively or concurrently except that restriction and extra duties may be combined in any manner to run for a period not in excess of the maximum duration for extra duties. Forfeiture of pay may not be combined with detention of pay, either concurrently or consecutively.²⁷⁴

The effect of these restrictions renders the Table of Equivalent Nonjudicial Punishments irrelevant as far as the Army is concerned.

Nonjudicial punishment imposed upon an Army enlisted man in the pay grade of **E-4** (with over two years service for pay purposes) might thus include reduction to the pay grade of private **E-1**, correctional custody (including extra duties) for thirty days, and forfeiture of fifty five dollars per month for two months (\$110.00). The same enlisted man, if tried by a summary court-martial, could receive a maximum sentence of reduction to private **E-1**, confinement at hard labor for thirty days, and forfeiture of seventy three dollars.²⁷⁵ A comparison of the two punishments illustrates that the commander's punishment power under Article 15 is not only equivalent to that of a summary court-martial, but in some cases exceeds it.

E. *RIGHT TO DEMAND TRIAL*

Except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by a court-martial in lieu of such punishment.²⁷⁶

In so providing, the amended Article adopts, in substance, the custom followed by the Army and Air Force to allow military per-

²⁷³ UCMJ art. 15(b).

²⁷⁴ AR 22-15, para. 7c.

²⁷⁵ MCM, 1951, para. 126c(2) (Addendum 1963)

²⁷⁶ UCMJ art. 15(a).

sonnel to demand trial in lieu of disciplinary punishment.²⁷⁷ Although this practice is traditional in the Army,” the Navy had never authorized such a procedure.²⁷⁹

The Manual provides that:

A person is attached to or embarked in a vessel if, at the time the non-judicial punishment is imposed, he is assigned or attached to the vessel, is on board for passage, or is assigned or attached to an embarked staff, unit, detachment, squadron, team, air group, or other regularly organized body.²⁸⁰

This “definition” does not add much to the language contained in the Article. All military personnel could be attached to vessels although their actual duty assignment might never require their presence aboard the vessel concerned. Whether personnel, under these circumstances, have a right to demand trial in lieu of non-judicial punishment is not answered by the Manual “definition.”

Although the previous Article 15 did not provide for the right to demand trial, it did authorize the punishment of confinement upon enlisted persons “attached to or embarked in a vessel.”²⁸¹ This phrase was apparently intended to mean persons “at sea.”²⁸² By using the same language, “attached to or embarked in a vessel,” in the new Article with respect to the right to demand trial, it might at first seem that the same meaning, “at sea,” was intended. However, it seems that Congress did not intend to limit “attached

²⁷⁷ *Hearings on H.R. 11257 Before a Subcommittee of the Senate Committee on Armed Services*, 87th Cong., 2d Sess. 32 (1962). Army and Air Force personnel attached to or embarked in a vessel, as well as Naval personnel, will not have the right to demand trial in lieu of disciplinary punishment. Under the previous Article, all Army and Air Force personnel were given this right by express Manual provision. See MCM, 1951, para. 132.

²⁷⁸ Since the Army’s first disciplinary punishment statute, in which the right to demand trial was expressly provided, this right has been eliminated from the statute governing the Army only once. When all the armed forces were brought under the *Uniform Code of Military Justice*, this provision concerning the right to demand trial was omitted from the statute due to the practice in the Navy which did not permit such a procedure. 96 CONG. REC. 1358 (1950) (remarks of Senator Kefauver).

“*Hearings on H.R. 11257, supra* note 277, at 13. The Navy was unsuccessful in its attempt to convince Congress that it should be allowed to retain its traditional practice of not allowing any of its personnel the right to demand trial. *Hearings on H.R. 11257, supra* note 277, at 9–14; *Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4911–915 (1962).

²⁸⁰ MCM, 1951, para. 132 (Addendum 1963).

²⁸¹ UCMJ, 1950, art. 15(a) (2) (E).

²⁸² 96 CONG. REC. 1358 (1950) (remarks of Senator Kefauver) ; H.R. REP. No. 491, 81st Cong., 1st Sess. 14 (1949). The view that “attached to or embarked in a vessel” was to apply only to personnel engaged in naval operations at sea was adopted by The Judge Advocate General of the Air Force. 2 DIG. OPS. JAG, *Nonjud. Punish.* § 11.1 (July 18, 1952).

to or embarked in a vessel" to that extent. In discussing the right to demand trial, the Senate Report says:

Except for the military members *aboard ship*, the effect of the committee amendment will be to continue the existing practice in the Army and Air Force and, at the same time, extend the right to members of the Navy, Marine Corps, and the Coast Guard.

Because of testimony by the Navy, the right to demand a trial by court-martial in lieu of nonjudicial punishment was not extended to those *aboard ship*, in view of the unique responsibilities of the ship's captain and in the interest of maintaining morale and discipline aboard ship. [Emphasis added.]²⁸³

The same reasons given in the Senate Report to justify denying persons aboard ship the right to demand trial would also appear to apply to persons on leave, pass, or otherwise absent from a ship docked in a foreign port, or *temporarily* docked in a domestic port.²⁸⁴

It seems reasonable to conclude that "attached to or embarked in a vessel" means persons aboard vessels, and when those vessels are temporarily in port, those persons attached to or embarked therein, whether or not on board. However, an attempt by either of the services to "attach" all its personnel to vessels to avoid getting them the right to demand trial would be in conflict with the intent of Congress. By including the right to demand trial in the Article, and by changing the Navy practice, it seems clear that Congress intended that the majority of military members would be guaranteed the right to refuse nonjudicial punishment by demanding trial.

Upon notification by the commanding officer of his intention to impose nonjudicial punishment, the Army requires that the offender be informed of his right to demand trial, if such a right exists.²⁸⁵ To assure that a person "offered" Article 15 punishment is afforded a reasonable period of time in which to determine whether he should demand trial, the Army has provided that the commander who intends to impose the punishment will:

. . . afford the member a reasonable period in which to decide whether or not he will demand trial and direct him to state either that he does, or does not, demand trial within that period. This period should be established after due consideration of such factors as the gravity of the offense, the grade of the member, and the time involved in physically transmitting the communication. Under ordinary circumstances, 48

²⁸³ S. REP. No. 1911, 87th Cong., 2d Sess. 2 (1962).

^{283a} This would not, in my opinion, include those crew members on shore for sustained periods of time (such as when their ship is in drydock).

²⁸⁴ AR 22-15, para. 11. The notice to the offender of the commanding officer's intention to impose punishment upon him must be given by the officer who is to impose the punishment. AR 22-15, para. 13; JAGJ 1963/8529 (Dec. 31, 1963).

hours **may be** considered to be a reasonable time in cases in which notification is given in writing and 24 hours when the notice **is oral**.²⁸⁵

It should be noted that except in cases involving relatively light punishments, the notification to the offender of the commander's intention to impose disciplinary punishment must be in **writing**.²⁸⁶ Therefore, the Regulations should be taken to mean that **as** the punishment becomes more severe, or the consequences or effect of the punishment upon the person concerned becomes more serious, a longer period of time (in which to make the determination) is "reasonable."

The Army has provided in its Regulations that a commander may proceed to impose punishment if the offender does not demand trial within the time specified in the "notification of intention." ²⁸⁷ Since the amended Article expressly provides that a member has **a** right to demand trial *prior* to the time punishment is imposed,²⁸⁸ the application of that regulatory provision to an offender who demands trial after the time specified in the "notification of intention" has expired, but before punishment is imposed, would deny the offender his statutory right to demand trial. Thus, to preserve its validity, paragraph 11 of the Regulation must be construed to mean that when the time specified by the commander has elapsed, he may proceed to impose punishment unless the accused demands trial before the commander actually imposes the punishment.

Whether charges will be preferred against an offender who demands trial by court-martial in lieu of nonjudicial punishment is a matter within the discretion of the commander imposing the punishment.²⁸⁹ It is likely that in most such instances, charges will be preferred and the offender brought to trial. The only cases in which charges would not be preferred would probably be those in which the available evidence would not be sufficient to establish the offender's guilt. In such a case, the commander concerned should not have offered the offender Article 15 punishment. An informal preliminary investigation should be conducted by the commander, or at his discretion, prior to initiation of nonjudicial punishment proceedings to determine whether the available evidence sufficiently establishes the offender's guilt of the offense. If the evidence is not sufficient, Article 15 proceedings should not be initiated. It would be in the best interests of discipline if commanders would remember a "principle" urged by several Judge

²⁸⁵ AR 22-15, para. 11.

²⁸⁶ AR 22-15, para. 14a.

²⁸⁷ AR 22-15, para. 11.

²⁸⁸ UCMJ art. 15(a).

²⁸⁹ AR 22-15, para. 11.

Advocates with whom this writer has served. That "principle" is, "Do not offer an accused Article 15 punishment unless you are prepared to go to trial."

In my experience, attempts to use Article 15 when the evidence of the offender's guilt is legally insufficient to warrant trial will ultimately result in a deterioration of discipline within the command. Eventually an offender will call the commander's bluff by demanding trial. Since a trial will not be forthcoming because of insufficient evidence, the fact that the commander's bluff has been called will spread throughout the command. As a likely result, the commander's authority will have been weakened, the "incident" rate within his command will show an increase which will be followed by an increase in the court-martial and nonjudicial punishment rates. When presented with a situation where the evidence of an offender's guilt is legally insufficient, allowing the offender to go "free" will do more toward maintaining a high state of discipline than will an attempt to impose nonjudicial punishment with the hope that he will not demand trial.

Although an offender who demands trial will usually be tried by summary court-martial, he is subject to trial by any military court-martial—summary, special, or general. It should be remembered that in the Army, the vast majority of nonjudicial punishment cases are handled by a company commander who does not exercise court-martial jurisdiction except under unusual circumstances. Thus, when an offender demands trial and charges are preferred, the actual decision as to what type court-martial shall try the charges will usually be made by a superior commander who may consider the offense more serious than did the company commander. Therefore, what started out as an offense that was considered minor by the company commander and for which he intended to impose a minor punishment, can conceivably result (if the offender demands trial), in a trial by general court-martial with a serious sentence being imposed. Any offender offered punishment under Article 15 would do well to bear this in mind when he deliberates on whether to demand trial.

The Army's original disciplinary punishment statute authorized punishment for "minor offenses not denied by the accused."²⁹⁰ Although that language was not included in subsequent statutes, the Army nevertheless took the position that an offender who did not demand trial thereby admitted his guilt of the offense.²⁹¹ This view would be untenable under the new Article. In providing in the amended Article that an offender who considers his punishment

²⁹⁰ AW 1916, art. 104.

²⁹¹ 3 BULL. JAG 424 (Sept. 28, 1944).

“unjust or disproportionate” to the offense may appeal,’@it seems Congress intended that the question of the offender’s guilt or innocence of the offense was a matter that could be considered in determining whether to set the punishment aside on appeal.”

Additionally, the Manual provides that Army personnel who are notified of an intention to impose nonjudicial punishment upon them will be given an opportunity to present matters in extenuation, mitigation, or **defense**, if trial is not demanded.²⁹⁴

With regard to this question, the Army has provided:

If, after evaluation of all pertinent matters, the officer conducting the proceedings determines that nonjudicial punishment is not warranted, he should notify the member that he has terminated the proceedings.²⁹⁵

Thus, there should no longer be any question concerning the effect of a member’s failure to demand trial. Army personnel who do not demand trial have *not* thereby admitted their guilt of the offense concerned. Rather, the question of the alleged offender’s guilt may be “litigated” in the initial Article 15 proceedings and/or on appeal. By failing to demand trial, he merely foregoes his right to have his guilt or innocence of the alleged offense, and his punishment, if any, adjudicated by a court-martial, and submits himself instead to a summary proceeding conducted by his commanding officer.

F. *SUSPENSION, MITIGATION, REMISSION, AND SETTING ASIDE*

1. *General.*

The amended Article expressly empowers the officer who imposes a punishment, or his successor in command, to suspend, mitigate, remit, or set aside any punishment imposed.²⁹⁶ Generally, the authority to suspend a punishment relates only to an unexecuted punishment but authority is contained in the Article to suspend a reduction in grade or a forfeiture of pay, whether executed or unexecuted.²⁹⁷ The authority to suspend some executed

²⁹² UCMJ art. 15(e).

²⁹³ *Hearings on H.R.* 7656, *supra* note 279, at 4947.

²⁹⁴ MCM, 1951, para. 133 (Addendum 1963).

²⁹⁵ AR 22-15, para. 13c.

²⁹⁶ UCMJ art. 15(d).

²⁹⁷ *Ibid.* The punishments of reduction, forfeiture of pay, and detention of pay, if unsuspended, take effect and are carried into execution on the date the commanding officer imposes the punishment. Other punishments, if unsuspended, take effect and are carried into execution on the date the commander imposes the punishment, unless otherwise prescribed by that officer or by superior authority. AR 22-15, para. 10.

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punishments was included in the Article for the purpose of circumventing a decision of the Comptroller General²⁹⁸ to the effect that a reduction in grade, being effective upon imposition, could not be suspended.²⁹⁹ The commander's authority to suspend, mitigate, remit, or set aside a punishment can be better understood by a separate consideration of these various powers.

There is one unusual problem, however, that cuts across this entire area, and it should therefore be disposed of first: under what circumstances may a subordinate officer suspend, mitigate, remit or set aside punishment imposed by a superior? As noted above, the statute provides that these powers may be exercised by the officer who imposed the punishment or "his successor in command." The Manual states that that term shall be defined in Regulations by the Secretary concerned,³⁰⁰ and the Army regulation provides that the "successor" is the officer who has succeeded to the command of the officer who imposed the punishment, or if the offender has been transferred to another command, his present commanding officer who can impose punishment of the "*kind involved*." In this latter situation, it appears that a present junior commander could reduce punishment imposed by a former senior.

Suppose, for instance, that General *A* punished Lieutenant *B* with a reprimand and 40 days' restriction, and that Lieutenant *B* was thereafter transferred to a different command. Lieutenant *B*'s present company commander, Captain *C*, is (unless his authority has been limited or withheld) a commander who can impose punishment of the "*kind involved*" (reprimand and restriction, on an officer) although he could not have imposed restriction in the same amount. If the regulation were literally read, Captain *C* could set aside the *entire* punishment, including the excess over the amount he could have imposed. This whole possibility is anomalous at best, and seems less than desirable: *first*, because it appears unseemly and disruptive of good discipline for any junior officer to set aside punishment that a senior has thought appropriate; *secondly*, because the granting of piecemeal appellate action by authorities not competent to deal with *all* the punishments imposed is likely to generate difficult practical problems of record-keeping, and possible inconsistent partial dispositions of the same case; *thirdly*, because it simply would not make sense for an officer to be able to reduce or set aside punishment he could not have imposed (the

²⁹⁸ Ms. Comp. Gen. B-131093 (June 12, 1957).

²⁹⁹ *Hearings on H.R. 7656, supra* note 279, at 4947-949.

³⁰⁰ MCM, 1951, para. 134 (Addendum 1963).

³⁰¹ AR 22-16, para. 15.

greater punishment powers of superiors being based on their presumably greater experience and responsibility).

The last point only is answered by a recent opinion to the effect that punishment is of the “*kind involved*” only to the *extent* that the successor in command would have had authority to impose such punishment.³⁰² The same opinion, however, indicates that to the extent that the junior “successor” *could* have imposed punishment of that kind, he can set it aside or take other ameliorative action, even though the punishment was imposed by a senior officer at a higher level of command than himself. Thus, in the hypothetical above, Captain C could set aside the reprimand and 30 of the 40 days’ restriction, and would presumably send the case up to his appropriate superior authority to seek elimination of the other 10 days of restriction. If the punishment had also involved (for instance) a forfeiture of pay, Captain C could not have affected that portion of the punishment to any extent, since he could not have imposed punishment of that kind (upon an officer).

Although the Regulation may have been intended to permit such a practice, it seems highly undesirable. The entire problem would be avoided by interpreting “successor in command” to include only those present commanders of the accused who are competent to impose the same kind *and amount* of *all* punishments involved. No good reason for a contrary rule is apparent. On a local level, the approach suggested above could be placed into effect by orders from the highest local commander,³⁰³ limiting his subordinates’ authority—to take ameliorative action as “successors in command”—to situations in which the above conditions were met.

2. Suspension.

Ordinarily, a suspension means that execution of a punishment is delayed during good behavior of the offender.³⁰⁴ As previously noted, however, the punishments of reduction in grade and forfeiture of pay may be suspended even though such punishments have already been **executed**.³⁰⁵ The period of suspension may not be longer than six months from the date of suspension, and the punishment is automatically remitted upon termination of the period of suspension, termination of the offender’s term of service,

³⁰² JAGJ 1963/8650 (Nov. 18, 1963).

³⁰³ See AR 22-15, para. 2c.

³⁰⁴ AR 22-15, para. 16.

³⁰⁵ An *executed* reduction or forfeiture of pay may be suspended within four months after the date it is imposed. MCM, 1951, para. 134 (Addendum 1963).

or upon the offender's death, whichever occurs earlier, provided the suspension was not previously vacated.³⁰⁶ Suspension of a punishment is intended to give "a deserving member a probational period during which he may show that he is deserving of remission of the suspended portion of his nonjudicial punishment."³⁰⁷

As a suspension may be vacated because of subsequent misconduct,³⁰⁸ an opportunity to deny or contest his guilt of that misconduct prior to vacation of the suspension may be of vital importance to the offender concerned. Although he has not been afforded such a hearing as a matter of right, the Manual does provide that:

[T]he probationer should, unless impracticable, be given an opportunity to appear before the officer authorized to vacate suspension of the punishment to rebut any derogatory or adverse information upon which the proposed vacation is based, and may be given the opportunity so to appear in any case.³⁰⁹

Under the former Article, a serious punishment such as reduction in grade could not be suspended due to the previously mentioned decision of the Comptroller General. In a situation where the reduction was recognized as unjust or disproportionate to the offense, the injustice could only be corrected by setting the reduction aside. This would result in the offender receiving no punishment for his offense. Naturally, commanders were reluctant to set aside a punishment under those circumstances. Many times, therefore, the punishment was allowed to stand rather than allow the offender to escape without punishment. With this new authority to suspend reductions and forfeitures of pay, although executed, the commander should no longer be presented with a situation where he must either let an unjust or disproportionate punishment go uncorrected or let the offender go unpunished.

The Manual authorizes any commanding officer to vacate a suspension if he is competent to impose *upon the offender concerned* punishment of the *kind* involved.³¹⁰ This is the same verbal formula that raises problems concerning the "successor in command," dis-

³⁰⁶ MCM, 1951, para. 134 (Addendum 1963).

³⁰⁷ AR 22-15, para. 16.

³⁰⁸ AR 22-15, para. 16. The kind or nature of "misconduct" that would authorize vacation of a suspended punishment is not specified in the Manual or Regulations. However, since nonjudicial punishment may only be imposed for acts or omissions constituting offenses under the punitive articles of the *Uniform Code of Military Justice*, it would seem that to authorize vacation of a suspended punishment, "misconduct" must also be an act or omission constituting an offense under the punitive articles of the Code.

³⁰⁹ MCM, 1951, para. 134 (Addendum 1963).

³¹⁰ *Ibid.*

cussed above. It apparently permits any junior commanding officer to vacate a suspension as to such parts or portions of the punishment that he would have been competent to impose.³¹¹ It thus poses the same dangers of disruption of discipline, confusion of records, and inconsistent piecemeal dispositions of the same case, and therefore seems an undesirable and anomalous practice. As in the case of the “successor in command,” *supra*, it would seem that this problem could be avoided by appropriate local orders.

3. Mitigation.

Mitigation is defined as “a reduction in either the quantity or the quantity or the quality of a punishment, its general nature remaining the same.”³¹² Action to mitigate a punishment may be exercised by the commander who imposes the punishment or his successor in command³¹³ or by a superior authority.³¹⁴ With the exception of reduction in grade, mitigation extends only to the *unexecuted* portion of a punishment.³¹⁵

In changing the quality of a punishment—for example, changing correctional custody to restriction—the mitigated punishment may not be for a greater period than the remaining unexecuted portion of the punishment mitigated.³¹⁶ “Thus, when a punishment to correctional custody for twenty days is mitigated to restriction, the maximum period of restriction would be twenty days. If the punishment imposed has already been partially executed when mitigation action is taken, then the mitigated punishment “may not run for a period greater than the remainder of the period for which the punishment mitigated was imposed.”³¹⁷ “Thus, in the example above, if **5** days of the **20** days of correctional custody had already been served, the restriction could not exceed 15 days. When a forfeiture of pay is mitigated to detention of pay, the amount of the detention may not be greater than the amount of the forfeiture.”³¹⁸

The amended Article expressly provides that a reduction in grade may be “mitigated” to a forfeiture or detention of pay.³¹⁹ However, changing a reduction in grade to a forfeiture of pay is

³¹¹ See JAGJ 1963/8650 (Nov. 13, 1963), discussed *supra* at pp. 90–91.

³¹² AR 22–15, para. 17a.

³¹³ MCM, 1951, para. 134 (Addendum 1963).

³¹⁴ AR 22–15, para. 27.

³¹⁵ AR 22–15, para. 17c.

³¹⁶ MCM, 1951, para. 134 (Addendum 1963).

³¹⁷ AR 22–15, para. 17c.

³¹⁸ MCM, 1951, para. 134 (Addendum 1963).

³¹⁹ UCMJ art. 15(d).

not "mitigation" within the generally accepted meaning of the term or within the Army definition, since it does not involve a reduction in quantity or quality of the punishment with its *general nature remaining the same*. Rather, it is a *commutation*, i.e., a changing of the punishment to one of a *different nature*.³²⁰ Thus, although commutation, as defined in the Manual, is not nominally authorized by the disciplinary punishment Article, the provision that a reduction in grade may be changed to a forfeiture or detention of pay is in reality a form of commutation.

4. *Remission.*

The remission of a punishment, which is defined as an action whereby the *unexecuted* portion of a punishment is cancelled,"" may be effected by the officer imposing the punishment, his successor in command,"" or by a superior authority."" Since only the unexecuted portion of a punishment may be remitted, it was intended that this action be used as a "reward" for good conduct subsequent to imposition of the punishment or where the punishment initially imposed was disproportionate to the offense or the offender.³²⁴

5. *Setting Aside.*

Setting aside a punishment is an action by which the punishment, or a part thereof, is nullified and any property, privileges, or rights affected by that portion of the punishment set aside is restored to the offender."" "The basis for this action is ordinarily a determination that, under all the circumstances of the case, the punishment has resulted in a clear injustice."³²⁶

G. APPEAL

Any offender punished under Article 15 has a right to appeal to the "next superior authority" if he considers his punishment unjust or disproportionate to the offense."" No time limit in which the appeal must be submitted is specified in the Article, but the Manual states that unless it is submitted within a reasonable time, it may be rejected by the authority charged with deciding

³²⁰ MCM, 1951, para. 105.

³²¹ AR 22-15, para. 18.

³²² MCM, 1951, para. 134 (Addendum 1963).

³²³ AR 22-15, para. 27.

³²⁴ AR 22-15, para. 18.

³²⁵ AR 22-15, para. 19.

³²⁶ *Ibid.*

³²⁷ UCMJ art. 15(e).

the appeal.³²⁸ For this purpose, fifteen days is considered a reasonable time in the absence of unusual circumstances.³²⁹ In providing that fifteen days is a “reasonable time” in which to submit an appeal, the Manual provision is not a limitation on the *power* of a superior authority to decide an appeal. Although an appeal may be rejected if it is not submitted within fifteen days, it need not be, as an Article 15 punishment is *never* final and may always be appealed.” Since the offender may be required to undergo the punishment during the time the appeal is being forwarded and decided,” the statutory directive that the appeal be promptly forwarded and decided should be scrupulously obeyed.³³²

For the purpose of deciding an appeal, the “next superior authority” is defined by the Army as that authority normally next superior in the chain of command to the officer who imposed the punishment.” In the event the offender is transferred to a different command prior to submitting an appeal, the “next superior authority” is the authority next superior to his present commanding officer who can impose punishment of the kind involved in the appeal.³³⁴ As discussed previously, a commanding officer exercising general court-martial jurisdiction or a general officer in command may delegate his authority to impose punishment under Article 15. Similarly, such a commander may also delegate his power to act on appeals to an officer exercising the functions of deputy or assistant commander.³³⁵ Once the appeal is decided by the next superior authority, no further appeal may be taken.³³⁶

When acting upon an appeal, the “next superior authority” is not limited to the matters forwarded with the appeal but may make an independent inquiry into the case if he so desires.³³⁷

³²⁸ MCM, 1951, para. 135 (Addendum 1963).

³²⁹ *Ibid.*

³³⁰ JAGJ 1963/8650 (Nov. 13, 1963).

³³¹ UCMJ art. 15(e).

³³² *Ibid.*

³³³ AR 22-15, para. 21.

³³⁴ *Ibid.*

³³⁵ *Ibid.* An officer who has delegated his authority to impose nonjudicial punishment to a principal assistant cannot act as the “next superior authority” as to any appeal from a punishment imposed by the principal assistant. MCM, 1951, para. 135 (Addendum 1963).

³³⁶ *Hearings on H.R. 7656 Before Subcommittee No. 1 of the House Committee on Armed Services*, 87th Cong., 1st Sess. 4959 (1962). A complaint under UCMJ art. 138, cannot be used as a means to submit a second appeal. 6 DIG. OPS. JAG, *Nonjud. Punish.* § 13.1 (Dec. 22, 1955).

³³⁷ AR 22-15, para. 24.

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Thus, matters not included in the "record" may be relied upon to uphold or set aside a punishment.

For the first time, it is required that certain Article 15 appeals be reviewed by a lawyer. The Article provides that an appeal *shall* be referred to a judge advocate if the punishment imposed includes:

- (1) arrest in quarters for more than seven days;
- (2) correctional custody for more than seven days;
- (3) forfeiture of more than seven days' pay;
- (4) reduction of one or more pay grades from the fourth or a higher pay grade;
- (5) extra duties for more than 14 days;
- (6) restriction for more than 14 days; or
- (7) detention of more than 14 days' pay.³³⁸

Any appeal involving punishment not requiring submission to a judge advocate may be so submitted if the commander wishes.³³⁹

As in the case with the "next superior authority," the judge advocate reviewing an appeal is not bound by the matters submitted with the appeal, but may make a separate inquiry if he so desires.³⁴⁰ The judge advocate's opinion must extend to both "the appropriateness of the punishment as well as his findings as to whether the proceedings were in accordance with the law and regulations."³⁴¹ As the commander refers an appeal to a judge advocate for *advice*,³⁴² it would seem that he is not bound to follow the advice or opinion of the judge advocate who reviews the appeal.

In acting on an appeal, the "next superior authority" may "exercise the same powers with respect to the punishment imposed as may be exercised . . . by the officer who imposed the punishment. . . ." Accordingly, he may suspend, mitigate, remit, or set aside in whole or in part, the punishment imposed." In no event can the punishment be increased on appeal." "Any superior authority may also exercise his power to suspend, mitigate, remit, or set aside a punishment even though the offender has not submitted an appeal."

³³⁸ UCMJ art. 15(e).

³³⁹ AR 22-15, para. 24.

³⁴⁰ MCM, 1951, para. 135 (Addendum 1963).

³⁴¹ AR 22-15, para. 25. The review by a judge advocate should include "a review of the proceedings, what happened, and what occurred" *Hearings on H.R. 7656*, *supra* note 336, at 4957.

³⁴² MCM, 1951, para. 135 (Addendum 1963).

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Hearings on H.R. 7656*, *supra* note 336, at 4916.

³⁴⁶ AR 22-15, para. 27.

An appeal must be submitted in writing and may, if the appellant so desires, include the reason for regarding the punishment unjust or disproportionate.”³⁴⁷ In addition to matters included in the “record of proceedings,”³⁴⁸ the appellant may attach to his appeal any document he wishes to be considered when the appeal is decided.”³⁴⁹ The commanding officer who imposed the punishment must make available to the offender “any necessary assistance” in preparing the appeal.”

Since the officer acting on the appeal, and the judge advocate who reviews it (in those cases where a review is required), may conduct a separate inquiry into the case, and since the appellant may attach any documents to the “record of proceedings” for consideration, an appeal actually constitutes a second hearing for the offender who wishes to take advantage of it.

H. *PROCEDURAL REQUIREMENTS*

1. *General.*

The commanding officer, upon ascertaining to his satisfaction after such inquiry as he considers necessary that an offense punishable under Article 15 has been committed by a member of his command, will, if he determines to exercise his Article 15 authority, notify the member of the nature of the alleged misconduct by a concise statement of the offense in such terms that a specific violation of the code is clearly stated and inform him that he intends to impose punishment under Article 15 for such misconduct unless, if such right exists . . . , trial by court-martial is **demande**d.³⁵¹

In providing for notification to the offender of the intention to impose nonjudicial punishment upon him, the Army has authorized an oral notification where the punishment involved does not exceed oral admonition or reprimand, restriction for more than fourteen days, extra duties for more than fourteen days, or a combination of those punishments.”³⁵⁰ In all cases involving officers and in cases where the punishment exceeds that just mentioned, the notification to the member must be in writing.”³⁵¹

³⁴⁷ MCM, 1951, para. 135 (Addendum 1963).

³⁴⁸ DA Form 2627 or DA Form 2627-1 constitutes the record of proceedings. AR 22-15, app.

³⁴⁹ AR 22-15, para. 22.

³⁵⁰ AR 22-15, para. 23. Whether “any necessary assistance” includes the advice of counsel will be discussed *infra* pp. 101-02.

³⁵¹ MCM, 1951, para. 133a (Addendum 1963).

³⁵² DA Form 2627. A sample copy of this form is included in the appendix to AR 22-15.

³⁵³ MCM, 1951, para. 133a (Addendum 1963).

In the Army, the notification of intent to impose punishment *must* be given by the officer who is to impose the punishment.³⁵⁴ Thus, in a case where the notification is oral, the offender concerned will have an opportunity to appear before the officer who will impose the punishment. However, if the notification is in writing, such an opportunity may not necessarily be afforded the offender.

Many of the rights and privileges granted to an accused in a trial by court-martial may conceivably be demanded by offenders facing Article 15 proceedings. Among those rights or privileges that could be considered basic to *fair* nonjudicial punishment proceedings³⁵⁵ are, (a) to be adequately informed of the specific nature of the offense charged, (b) to appear personally before the officer imposing the punishment, (c) to be represented by counsel at all stages of the proceedings, (d) to be confronted by adverse witnesses and to cross examine those witnesses, and (e) to call witnesses and to examine those witnesses called. These various rights will be considered separately for the purpose of ascertaining whether they must be granted to an offender facing an Article 15 proceeding.

2. *Notification as to the Nature of the Offense.*

The amended Article is silent with regard to notice to the offender concerning the nature of the offense he is alleged to have committed. The Manual, however, provides that the officer imposing the punishment *will* notify the offender of the nature of the alleged offense "by a concise statement of the offense in such terms that a specific violation of the code is clearly stated. . . ." ³⁵⁶

The Army, in its sample copies of DA Forms 2627 and 2627-1 (included in the appendix to Army Regulations Number 22-15), sets out the nature of the hypothetical offense involved without reference to a specific article of the Code. In an example concerning a drunk and disorderly offense, the offense is stated as follows:

It has been reported that, on or about 2300 hrs, 2 March 1963, at Sundown, Mo., you were drunk and disorderly in a public place known as "Ernie's Bar and Grill."³⁵⁷

³⁵⁴ AR 22-15, para. 13a; JAGJ 1963/8529 (Dec. 31, 1963).

³⁵⁵ "Absolute fairness" is a requirement in Article 15 proceedings. AR 22-15, para. 12.

³⁵⁶ MCM, 1951, para. 133a (Addendum 1963).

³⁵⁷ AR 22-15, fig. 2, app.

A comparison of this statement of the offense of drunk and disorderly with the model court-martial specification provided in the Manual for this offense³⁵⁸ will show that the allegations contained in both are substantially the same.

At the present time, there are no well defined guidelines with respect to how specific the statement of the nature of the alleged misconduct must be. The Army's sample forms, however, indicate that the statement should be substantially as specific as a specification alleged for the purpose of trial by court-martial.

Until further guidelines are provided, commanders should refer to the sample court-martial specification provided in the Manual for the offense concerned, and furnish the offender with a statement of the alleged offense in substantially that form and detail.

3. *Personal Appearance Before the Officer Conducting the Proceedings.*

A personal appearance before the officer imposing the punishment is not available to an offender as a matter of right under the statute.³⁵⁹ The Manual provides, however, that the offender *may* be permitted to appear in person before the commander authorized to impose the punishment," and the Army provides that a member may "request permission to appear before the officer conducting the proceedings" and that this request should be granted, if practicable.³⁶¹

Neither the subcommittee hearings nor the committee reports indicate that Congress considered this question. How they would have resolved the question, therefore, cannot be determined. However, when it is recalled that nonjudicial punishment is designed to enable commanders to enforce discipline effectively and swiftly,"*that the commander and the offender may often be widely separated geographically, and that Article 15 proceedings should not be "bogged down" with procedural requirements," it seems unlikely that Congress, had they considered the question, would have imposed an absolute requirement that an offender *must* be

³⁵⁸ Sample specification No. 132 provides: "In that _____ was, (at) . . . _____, on or about _____, 19____, . . . (drunk and disorderly) . . . [in . . . a public place, to wit: _____] . . ." MCM, 1951, app 6c.

³⁵⁹ A "hearing" is *usually* granted an offender in the Navy. See MCM, 1951, para. 133b (Addendum 1963).

³⁶⁰ MCM, 1951, para. 133a (Addendum 1963).

³⁶¹ AR 22-15, para. 13b.

³⁶² *Hearings on H.R. 7656*, supra note 336, at 4914.

³⁶³ *Id.* at 4961.

afforded an opportunity to appear before the commander conducting the proceedings.

Nevertheless, a personal appearance may be *essential* if the proceedings are to be conducted with "absolute fairness." An oral presentation is often more persuasive than a presentation of the same matter on paper. Too, in cases where statements of the witnesses (including the offender) are conflicting, there would seem to be no other way to learn the truth than by personally interviewing those witnesses in the presence of the offender for the purpose of determining their credibility and observing their general manner in giving evidence.

During combat operations, the particular situation might preclude personal appearances before the commanding officer. Admittedly, that process due in peacetime is not necessarily due on the battlefield.³⁶⁴ However, except where manifestly impracticable—as on the battlefield—a personal appearance, if requested by the offender, should be granted. In addition to contributing to "absolute fairness" in nonjudicial punishment proceedings, the right to a personal appearance is also a factor which would contribute to a favorable decision concerning the constitutionality of Article 15, when that issue is raised in either a military or civil court.

4. *Assistance of Counsel.*

The advantages to an offender of the advice and assistance of counsel when determining whether to demand trial or accept Article 15 punishment, in presenting evidence in extenuation, mitigation, or defense, and in preparing an appeal, are obvious. Since the detrimental effect of nonjudicial punishment on the career of an officer or senior enlisted member may conceivably be as serious as that of a conviction by court-martial,³⁶⁵ assistance of counsel during the various stages of the proceedings can be as important to the offender facing Article 15 punishment as it is to the accused in a court-martial.

Congress, however, apparently did not intend that an offender be afforded a *right* to the assistance of counsel at any stage of the proceedings. This conclusion is drawn from the following discussion during hearings on the amended Article before a subcommittee of the House Committee on Armed Services:

³⁶⁴ See *Wade v. Hunter*, 336 U.S. 684 (1949).

³⁶⁵ For example, an Army officer punished under Article 15 *must* be considered for possible elimination from the service. Army Regs. No. 635-105, para. 12a(1) (Dec. 13, 1960, as changed),

Mr. Bates. But he doesn't have a counsel when he goes before the Commanding officer.

Captain Greenberg. That is right.³⁶⁶

Further discussion brought out the following:

Mr. Blanford. I think we should bear in mind that what we are attempting to do here is to give commanding officers some method by which they can enforce discipline without having to have a lawyer at their beck and call every 2 minutes.

. . . if somebody else senior to the officer who gave the punishment reviews it, at least the boy or the man has had a review in which his case has been presented.

Now, if we are going to reach the point where every company is going to have to have a lawyer available to review these things in time of war—

Mr. Rivers. Well—

General Kuhfeld. It would never work.

Mr. Blanford. We would be just bogged down. You couldn't maintain discipline.³⁶⁷

With regard to appeals, the Army requires that the officer imposing the punishment make available to the offender "any necessary assistance" in preparing his appeal.³⁶⁸ That provision leaves itself open to a construction that "any necessary assistance" includes the assistance of counsel.

In many cases, assistance of counsel would be necessary if the appeal is to present matters favorable to the offender. For example, the average offender would not be aware that the statute limitations is applicable to Article 15 proceedings and would bar punishment if the statutory period has run.³⁶⁹ He may not know the maximum punishment that can be imposed by his commanding officer. He may have a good defense to the offense he allegedly committed but because of his ignorance of the law, he may not be aware of it. There would seem to be few cases in which it could be said that counsel is *not* necessary.

In practice, assistance of counsel is usually available to Army officers who have been offered punishment under Article 15. However, such assistance is not normally available to enlisted persons upon whom such punishment is to be imposed. Since officers are involved in only a small percentage of the nonjudicial punishment cases in any given command, it is accurate to say that offenders are not usually provided with assistance of counsel in Article 15 proceedings in the Army. For this reason, it is unlikely that by

³⁶⁶ "Hearings on H.R. 7656, *supra* note 336, at 4912.

³⁶⁷ *Id.* at 4961.

³⁶⁸ AR 22-15, para. 23.

³⁶⁹ MCM, 1951, para. 68c; 3 DIG. OPS. JAG, *Nonjud. Punish.* § 5.61 (Oct. 28, 1953).

the phrase "(any necessary assistance)" the Army intended to mean that assistance of counsel is necessary and *must* be furnished. Until a more specific guideline is furnished, however, a good argument can be presented that assistance of counsel is "necessary" and *should* be provided to an offender who is preparing an appeal.

Should the Army undertake to provide counsel to all offenders in Article 15 proceedings, it is possible that its legal officers would be overwhelmed by the mass of cases presented to them. As a practical matter, therefore, it may be impossible to furnish all offenders with counsel. However, since the adverse effect of nonjudicial punishment upon a member's career and/or promotion potential may be as serious as that resulting from a conviction by court-martial, assistance of counsel should be made available to offenders to the maximum extent possible—especially to those who plan a military career. Assistance of counsel would contribute substantially to "absolute fairness" in Article 15 proceedings.

5 Confrontation, Examination, and Cross Examination.

As with most of the procedural aspects of Article 15, the statute does not say whether the offender should be confronted with witnesses or other evidence to be used against him. The Congressional hearings likewise shed no "light" on this question. However, the Manual provides that the officer imposing the punishment *may* personally interview witnesses.³⁷⁰ This provision implies that confrontation is not essential. Therefore, it would seem that the decision concerning what punishment to impose, if any, could be made on the basis of written statements or pure hearsay.

The Army provides that an offender *may request* his commanding officer to interview or obtain statements from certain witnesses and that this request should, if practicable, be granted.³⁷¹ This provision similarly implies that confrontation is not required.

There is no indication that confrontation has ever been accorded Army personnel, as a matter of right, in Article 15 proceedings. In my experience with the administration of Article 15, confrontation has been the rare exception, not the rule. Considering only the provisions of the Article, the Manual, and the Regulations, it would seem that confrontation is not a right but a privilege that *may* be granted by the commanding officer concerned. Confrontation is so basic to fair proceeding, however, that denial of a request for confrontation violates one's sense of justice and fair play.

³⁷⁰ MCM, 1951, para. 133a (Addendum 1963).

³⁷¹ AR 22-15, para. 13b.

Many commanders would probably object to any absolute requirement of confrontation, because (a) such a procedure would encumber the administration of disciplinary punishment with innumerable delays, (b) it would require that a considerable amount of the commander's time be spent in conducting nonjudicial punishment proceedings, and (c) the delays encountered would thwart their attempts to swiftly punish minor offenses, and thus adversely affect the state of discipline within their commands.

These objections can be answered by referring to the Navy's nonjudicial punishment procedure (Captain's Mast), in which the right to confrontation is ordinarily available to the offender. Under the previous Article, the Manual provided that Navy commanding officers would give both the accused and the accuser an impartial hearing to include any matter in extenuation, mitigation, or defense which the offender desired to offer.³⁷² Under the amended Article, the evidence against the accused is normally presented in the offender's presence, either by testimony of the witnesses in person or by receipt of their written statements (copies thereof being furnished to the offender).³⁷³ In addition, *all* items of information in the nature of physical or documentary evidence that are considered by the commander are made available to the offender for his inspection.³⁷⁴

If this procedure can be followed by the commander of an aircraft carrier with several thousand men under his command, there is little reason why an Army company commander, whose command would not normally include more than three hundred men, could not do likewise.

When witnesses are called, the offender should be given an opportunity to examine and/or cross examine those witnesses. It is likely that the matters about which a witness (called at the request of the offender) is competent to testify may be exclusively within the offender's knowledge. In that event, examination of the witness by the offender could *save time* as well as *contribute to the dignity and fairness of the proceedings*.

The right to cross examine an adverse witness is so basic and fundamental it is difficult to see how proceedings could be conducted in "absolute fairness" without granting the offender this right. Cross examination of the witness by the offender might uncover testimony favorable to the offender that was not elicited

³⁷² MCM, 1951, para. 133b.

³⁷³ MCM, 1951, para. 133b (Addendum 1963).

³⁷⁴ Ibid.

during examination of the witness by the commander, and it might even show that the witness was not telling the truth.

Except when operating on the battlefield, or under similar conditions, there does not seem to be any *good* reason why the offender should not be afforded the right to confront adverse witnesses, the right to cross examine those witnesses and the right to examine witnesses called at his request. In addition to contributing to fair proceedings, and inspiring confidence in the administration of non-judicial punishment, these are also factors that should influence the courts to uphold the constitutionality of the disciplinary punishment Article.

6. *Submission of Evidence by the Offender.*

Any member against whom nonjudicial punishment is initiated has a right to submit "any matter in extenuation, mitigation, or defense he desires to be considered."³⁷⁶ That evidence offered by the offender may include statements of witnesses, reports, records, and any statement the offender wishes to make."³⁷⁷ As concluded previously, this right to present evidence in his behalf should include the right to make the presentation in a hearing conducted by his commanding officer.

In providing that the offender may submit evidence, neither the Manual nor Regulations expressly grant him the right to call witnesses in his behalf. Having already concluded that an offender should, upon his request, be given a hearing before his commanding officer, it necessarily follows that during the hearing the offender should, in "absolute fairness," be afforded the opportunity to call witnesses. It is inconceivable that a hearing could be fair and impartial unless *both* sides are given an opportunity to be heard. Recalling that the commander's punishment power under Article 15 in some cases exceeds that of a summary court-martial, it seems only reasonable to apply generally the same procedural safeguards to disciplinary punishment proceedings as are applicable to the summary court-martial. Among those safeguards is the right to call witnesses.

Although the Regulations do not say that the right to present evidence includes the right to call witnesses, it is provided that the offender may request his commanding officer to interview witnesses and that this request should be granted, if practicable.³⁷⁷

³⁷⁵ MCM, 1951, para. 133a (Addendum 1963).

³⁷⁶ The member must be informed that he is not required to make any statement regarding the offense or offenses of which he is accused or suspected. MCM, 1951, para. 133a (Addendum 1963).

³⁷⁷ AR 22-15, para. 13b.

“If practicable” should be read as meaning the request *will* be granted unless it would be *manifestly* impracticable to do so by reason of military exigency (as for example, during combat operations).

To prevent this right from being arbitrarily denied by commanders, the Regulations should require commanding officers to attach to the record of proceedings a justification for any denial of a request by the offender that certain witnesses be called. As a practical matter, knowing that the decision may be reviewed by superior authority should result in the request being granted by the commanders except in those cases where it would *actually* be manifestly impracticable to do so.

I. THE EFFECT OF PROCEDURAL ERROR IN ARTICLE 15 PROCEEDINGS

The only guidelines provided with reference to the effect of procedural errors in disciplinary punishment proceedings is contained in the Manual which states:

A failure to comply with any of the procedural provisions of this chapter [concerning nonjudicial punishment] will not invalidate a punishment imposed under Article 15, except to the extent that may be required by a clear and affirmative showing of injury to a substantial right of the person on whom the punishment was imposed, which right was neither expressly or impliedly waived.³⁷⁸

Of the multitude of errors that may conceivably occur in Article 15 proceedings, which, if any, would constitute “substantial error”³⁷⁹ is not specified.

Failure to afford the offender the right to demand trial (when this right exists), failure to clearly inform him of the alleged offense, failure to grant his request for a hearing or to interview witnesses (when it is practicable to do so); and imposition of a punishment not authorized by the Article or one that exceeds the authorized maximum, would seem to constitute “substantial error” which would require invalidation of the punishment.³⁸⁰

³⁷⁸ MCM, 1951, para. 130 (Addendum 1963).

³⁷⁹ “Substantial error” is used to designate an error that would be prejudicial to a substantial right of the offender and thus require that the punishment be set aside. “Harmless error” indicates other errors.

³⁸⁰ Under previous Articles, failure to afford the offender the right to demand trial was waived if the offender acquiesced in the punishment. However, if he protested and demanded a trial, the punishment was a nullity. DIG. OPS. JAG 1912-1940, § 462 (5) (Jan. 6, 1926).

At the other "pole," such errors as failure of the statement of the offense to include the particular hour of the day of offense allegedly occurred (provided the accused was not thereby misled), or the failure of an order effecting an Article 15 reduction to indicate "misconduct" as the reason for the reduction, would appear to be "harmless."

Because specific guidelines are not provided, it must be concluded that with respect to most procedural errors, whether the error is "substantial" must be determined by commanders and judge advocates on a case by case basis. When the circumstances of a particular case reasonably indicate that the error concerned could have prejudiced a substantial right of the offender, that error should be considered "substantial" and the punishment set aside.

J. RECORD OF THE PROCEEDINGS: WHAT IS REQUIRED?

The Army requires that a written record be maintained of all actions taken in Article 15 proceedings, and that DA Form 2627, 2627-1, and 2627-2 be used for this purpose.³⁸¹ In addition, the Manual provides that when the proceedings are conducted in writing, written statements and documentary evidence considered by the commander will be attached to the record of proceedings, and that when oral proceedings are conducted, a "summarized record" of the proceedings will be made.* However, the Manual does not specify what is to be included in a "summarized record." In fulfilling this requirement to make a "summarized record" of oral proceedings, the Army has merely provided that its commanders will use DA Form 2627. That form does not indicate whether a "summarized record" should include a summary of oral statements made by witnesses interviewed by the commander.

Even though it may not be required, it would be wise for commanders to adopt the practice of summarizing and including in the record all oral statements considered in Article 15 proceedings. By including in the record all evidence upon which an Article 15 punishment is based, appeals could be quickly and fairly decided without any necessity for conducting a separate inquiry. Recalling that nonjudicial punishment is never final and can always be appealed,³⁸² the value of a complete record to an officer charged with deciding an appeal submitted several years after the punishment is imposed is obvious. Of primary importance, however, a "summarized record" of *all* the proceedings will assist materially

³⁸¹ AR 2215, para. 14a.

³⁸² MCM, 161, para. 133a (Addendum 1963).

³⁸³ JAGJ 1963/8650 (Nov. 13, 1963).

in maintaining “absolute fairness” in the administration of non-judicial punishment: a complete record would provide a “check” on commanders who might abuse their disciplinary powers by imposing punishment when it is not warranted by the offense, the offender, or the evidence.

Therefore, in the Army the record of proceedings under Article 15 should include DA Forms 2627, 2627-1, and/or 2627-2, as appropriate, the information required to be included therein, any written statements or documentary evidence considered, and a summary of the testimony of witnesses interviewed by the commanding officer who conducted the proceedings. The record required under the amended Article is far superior to that required under the previous Article,³⁸⁴ and, moreover, as good as the record of the proceedings of a summary court-martial, and in many cases superior to that record.³⁸⁵

V. THE AMENDED ARTICLE: IS IT ACCOMPLISHING ITS INTENDED PURPOSES?

Recalling that the new Article was intended, *inter alia*, to reduce the number of courts-martial, to prevent stigmatization of military personnel's records with criminal convictions, and to correct serious morale problems adversely affecting discipline, a “long look” at Article 15 would not be complete unless the question of whether the amended Article is accomplishing these purposes is discussed and at least partially answered. Since the new Article has been in effect for only a short time, it would be premature to attempt to judge the Article's ultimate effect on military discipline. Nevertheless, enough statistics are currently available to warrant some conclusions concerning whether the new Article is likely to fulfill its various purposes. The following discussion is

³⁸⁴ The record prepared under the previous nonjudicial punishment Article contained (a) the offense; (b) when and where it occurred; (c) the punishment imposed; (d) the officer who imposed it; (e) date the offender was notified of the punishment; (f) decision on appeal, if any; (g) any action taken in the nature of remission, mitigation, suspension, or setting aside of the punishment; (h) any remarks the commander wished to include; (i) the initials of the offender's immediate commander; and (j) the initials of the offender indicating he understood his rights. MCM, 1951, app. 3a.

³⁸⁵ The record of the proceedings of a summary court-martial consists of the charge sheet which includes the charges and specifications, pleas and findings, sentence imposed, and action of the convening authority. MCM, 1951, app. 11. Documentary evidence considered by the summary court is not required to be attached to the record. Likewise, there is no requirement that the testimony of witnesses be reduced to writing and included in the record.

based on Army statistics compiled for the period April through June and October through December 1963.³⁸⁶

The amended Article has had a tremendous impact on the Army's summary court-martial rate. During the last nine months of 1963, 12,271 summary courts-martial were conducted compared with 41,848 during the same period in 1962. This represents a reduction of approximately seventy percent in the number of summary courts-martial. "This decrease can be attributed primarily to the amended Article 15"³⁸⁷ Unfortunately, the anticipated decrease in the special court-martial rate has not been accomplished.³⁸⁸

In addition to reducing substantially the number of summary courts-martial, the amended Article is apparently having a very beneficial effect on overall military discipline. During the second calendar quarter of 1963, Army commanders imposed nonjudicial punishment in 52,447 cases. This number was reduced to 38,385 by the last calendar quarter of the year. It would appear, therefore, that the new Article is correcting "serious morale problems adversely affecting discipline."

Concerning the punishments used by the Army, the statistical reports show that the most frequently used punishments are, in order, extra duties, restriction, forfeiture of pay, and reduction in grade. Correctional custody, confinement on bread and water, arrest in quarters, and detention of pay have been used in relatively few cases.

Since a decrease in reliance on the punishment of reduction in grade was **one** reason for the changes in Article 15, it is interesting to note that a total of 22,567 reductions (including 643 involving more than one grade) were imposed during the two calendar quarters for which statistics are available. Of that number, 3,810 were suspended. Whether this represents a decrease from the number of reductions imposed during the corresponding period in the previous year cannot be determined since records were not centrally

³⁸⁶ Pertinent statistical data has been extracted from the Army reports and included in appendices. See *infra* pp. 113-19.

³⁸⁷ Annual Report of the United States Court of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury Pursuant to the Uniform Code of Military Justice for the Period January 1, 1963, to December 31, 1963, at 61.

³⁸⁸ The special court-martial rate for 1962 was approximately 2.08 per 1000 average strength. DA Pam 27-101-100 (62 JALS 100/11); DA Pam. 27-101-101 (62 JALS 101/12); DA Pam 27-101-106 (62 JALS 106/3); DA Pam 27-101-112 (62 JALS 112/5); DA Pam 27-101-119 (63 JALS 119/2). The special court-martial rate for the first nine months of 1963 was approximately 2.20 per 1000 average strength. DA Pam 27-101-129 (63 JALS 129/8); DA Pam 27-101-133 (63 JALS 133/11); DA Pam 27-101-139 (63 JALS 139/6).

maintained under the old nonjudicial punishment Article. It does appear, however, that reduction in grade is still used too frequently.

The vast majority of reductions involved offenders in pay grades **E-3** and **E-4**. Offenders in those pay grades accounted for **19,907** reductions. Since reduction of personnel in those pay grades may be effected by company commanders, it is likely that had punishments within the authority of *superior* commanders been employed more frequently—such as extra duties and restriction for forty-five days—reduction in grade might have been avoided in many cases. Nevertheless, it is reassuring to note that during the two calendar quarters concerned, only **1,823** enlisted personnel serving in pay grades **E-5** and above were reduced under Article **15**, and that only **369** reductions involved personnel serving in pay grades *above E-5*.

It seems, from analysis of available statistics, that offenders are generally satisfied with the fairness of the punishments imposed by their commanders. This conclusion is based on the fact that only **3,057** appeals were taken from the **90,832** cases conducted under the new Article during the six months period covered by the statistics. Thus, less than four percent of the cases have resulted in appeals. This indicates that commanders are exercising their disciplinary punishment powers judiciously. This conclusion is further buttressed by the fact that only **1,971** persons demanded trial in lieu of Article **15** punishment,³⁸⁰ and that action to suspend, mitigate, remit, or set aside punishments has been taken in more than ten percent of the cases processed during the period concerned.³⁸⁰

³⁸⁰ This figure is derived from the number of summary courts-martial conducted involving persons who demanded trial in lieu of Article 15 punishment. Only fourteen of the **90,832** Army nonjudicial punishment cases involved offenders who did not have a right to demand trial.

³⁸⁰ Another interesting statistic extracted from the Army reports shows that in those appeals not referred to judge advocates, the punishment was set aside, in whole or in part, in almost forty one percent of the cases appealed. Punishments were set aside, in whole or in part, in only twenty-four percent of the appeals reviewed by judge advocates. These figures could have several meanings. Since judge advocates normally only review punishments imposed by superior commanders, it could mean that fewer errors are made at higher command levels than are made at company level. Further inquiry is needed, however, for if errors have occurred in almost half the cases appealed from punishments imposed at company level, action should be taken to locate the problem and correct it. This statistic could also mean that unduly harsh (although lawful) punishments are being imposed upon offenders thus necessitating action on appeal to correct injustices, or that in reviewing appeals, judge advocates are not as fair as commanders. Whatever its meaning, it is apparent that this matter should be the subject of additional inquiry to determine what the problems are, if any, and how they can be remedied.

Another interesting feature revealed by the statistics is that offenders in pay grade E-3 were involved in 40,664 Article 15 cases, almost one-half the total number of cases conducted during the six months period. Although it is reasonable to assume that a large percentage of the Army's enlisted strength occupy this pay grade, it is unlikely that that percentage would approach fifty percent.

An overall analysis of the available statistics shows that since the effective date of the new Article, (a) the number of summary courts-martial conducted in the Army has been reduced by over seventy percent; (b) the number of nonjudicial punishment cases has been reduced; (c) supplementary action to suspend, mitigate, remit, or set aside punishment has been taken in more than ten percent of the cases; (d) appeals have been taken in less than four percent of the total cases; and (e) a substantial majority of the punishments are imposed at company level. It appears, therefore, that Article 15 is generally fulfilling the stated purposes for which it was amended.

VI, CONCLUSION

By enacting nonjudicial punishment legislation, Congress has indicated that trial by court-martial is not, in all cases, an effective means for the preservation of discipline and the maintenance of effective armed forces. In its judgment, commanders *must* have authority to swiftly and effectively punish minor offenses without resorting to court-martial procedures.

This concept was first recognized by military commanders during the Revolutionary War. During and following the Revolution, commanders imposed summary punishment without statutory or regulatory authority. Finally recognizing the necessity for a summary punishment procedure, disciplinary punishment to be administered by commanders was authorized by Army Regulations in 1895. It was not until relatively modern times that Congress began to legislate in this area. However, since its first nonjudicial punishment statute in 1916, Congress has exercised exclusive control of such punishment by legislative enactments.

Initially, nonjudicial punishment seems to have had only one basic purpose—giving commanding officers a means to preserve discipline. However, another purpose—benefiting the offender—has become increasingly important. Congress appears to have been particularly impressed with the fact that nonjudicial punishment would be *less harmful* to the offender than a trial by court-martial, even though the punishment authority of both is the same. Con-

gress' concern with benefiting the offender was the primary reason for including in the amended Article certain fundamental procedural rights such as the right to demand trial (except when attached to or embarked in a vessel) and review of certain appeals by judge advocates or law specialists. These rights should help assure that nonjudicial punishment is administered in a manner beneficial to the offender as well discipline. Therefore, in administering nonjudicial punishment, a procedure that is fair to the offender should be provided if Congress' intent is to be effectively realized.

Since the end of World War 11, the nonjudicial punishment statute governing the Army has been amended on three occasions. Each amendment has increased the commander's punishment authority. The increase in that authority by the recent amendment gave senior commanders punishment authority equivalent to that exercised by the summary court-martial.

This substantial increase in punishment authority is likely to result in an attack on the nonjudicial punishment Article's constitutionality. The constitutional question has not previously been raised in a court of law, civil or military, but it must be anticipated that the courts will probably be presented with the question in the near future. Although the nonjudicial punishment procedure may infringe upon certain individual rights, the "balance" struck by Congress between individual rights and the need for maintaining well-disciplined and effective armed forces to guard and preserve our national existence does not seem to be unreasonable. However, to assure a favorable decision when the constitutional issue is raised, it would be wise to provide offenders with as many procedural rights as possible. In the absence of military exigency, there seems to be no valid reason why offenders should not be afforded such basic procedural rights as the right to a hearing, to confrontation, to cross examine adverse witnesses, and to present evidence. Whether these rights are available to offenders could be the pivotal question when the constitutional issue is decided by the courts.

Apart from their constitutional significance, fair procedures are likely to have a telling impact on the acceptance and success of the amended Article 15. Congress' intention to decrease the number of inferior courts-martial would be frustrated if any substantial number of persons demanded trial instead of nonjudicial punishment, and servicemen will more readily accept such punishment if it acquires the reputation of being fairly administered. Further, the correctional and rehabilitative purposes of Article 15

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are more likely to be accomplished if the individual thinks that he has been fairly treated.

In the past two years, the services have made several efforts to improve the administration of military justice. Those efforts have resulted in improvements in the quality of justice dispensed by the armed forces, and, as Major General Charles L. Decker, former Judge Advocate General of the Army, has said:

. . . the greatest single improvement has been the enactment of article 15, which has provided for the correction of young soldiers by their commanders. No permanent stain is left on the soldier's record. Long since, the officers of the Army have dropped the concept of the pseudo-exemplary sentence, the unfairly heavy punishment designed to scare potential offenders. With a few exceptions, military men realize that, except for those who must be kept away from society indefinitely, punishment should be directed toward correction and rehabilitation. Article 15 provides small corrective dosages for expeditious administration. Normally, the soldier is not removed from his fellows and his training, thereby eliminating problems of restoration to the community after confinement. This simple provision for expeditious correction draws us closer to basic and universal concepts of *good* justice, because it creates a neighborhood consciousness of good order and discipline. The principle of administration of justice close to the community is admirably demonstrated in the use of this **article**.⁸⁹¹

⁸⁹¹ Annual Report of the United States **Court** of Military Appeals and The Judge Advocates General of the Armed Forces and the General Counsel of the Department of the Treasury Pursuant to the Uniform Code of Military Justice for the Period January 1, 1963, to December 31, 1963, at **7273**.

APPENDIX A

COMPARISON OF THE ARMY'S SUMMARY COURT-MARTIAL RATE
BEFORE AND AFTER THE EFFECTIVE DATE OF THE
AMENDED ARTICLE

Reported quarter	1962	1963	Number of summary courts-martial conducted as a result of refusals to accept Article 15 punishment (1963).
April, May, June.	11,143	4,419	744 (17% of total number of summary courts-martial).
July, August, September.	10,919	4,168	687 (16% of total number of summary courts-martial).
October, November, December.	9,786	3,684	540 (15% of total number of summary courts-martial).
TOTALS -----	41,848	12,271	1,971

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APPENDIX B

ARMY PERSONNEL PUNISHED (1 April-30 June 1963)
(By Grade)

	Totals	Officers	W/O	E-9	E-8	E-7	E-6	E-5	E-4	E-3	E-2	E-1
Right to demand Trial existed.	52,436	77	10	3	37	222	1,046	4,362	9,394	23,386	10,366	3,533
No right to demand trial existed.	11	0	0	0	0	1	2	4	3	1	0	0

APPENDIX C

ARMY PERSONNEL PUNISHED (1 October-31 December 1963)
(By Grade)

	Totals	Officers	W/O	E-9	E-8	E-7	E-6	E-5	E-4	E-3	E-2	E-1
Right to demand trial existed.	38,382	46	8	5	30	155	777	3,635	6,809	17,278	7,575	2,064
No right to demand trial existed.	3	0	0	0	0	0	0	0	1	0	1	1

APPENDIX D

ARTICLE 15

TYPES OF PUNISHMENT IMPOSED BY ARMY COMMANDERS 1 April-30 June 1963)
(By Grade)

	Locals	Officers	W/O	E-9	E-8	E-7	E-6	E-5	E-4	E-3	E-2	E-1
Oral admonition or reprimand	7,258			0	9	53	195	701	1,339	2,950	1,799	531
Written admonition or reprimand	1,253	69	10	0	4	29	87	189	238	428	156	43
Restriction												
14 days or less	22,127	0	0	0	5	37	222	1,337	3,402	9,929	5,377	1,818
15 days or more	2,288	9	1	1	3	7	75	292	348	714	608	230
Extra duties												
14 days or less	22,285			0	2	12	91	801	3,274	10,652	5,561	1,892
15 days or more	1,728			1	0	1	14	102	197	574	599	240
Correctional custody.												
7 days or less	72											
8 days or more	111									24	33	15
Arrest in quarters	1	1	0							17	68	26
Reduction												
From E-5 & above	902			2	7	26	145	722				
From E-4 1 grade or lower	10,624								2,455	7,716	453	
Over 1 grade	489											
Detention												
\$149.00 or less	711	0	0	0	1	3	128	114	147	274	116	28
\$150.00 or more	130	2	0	0	1	5	23	27	19	37	30	6
Forfeiture												
\$74.00 or less	18,528	6	1	0	8	76	434	2,014	3,395	6,653	4,452	1,489
\$75.00 or more	1,289	40	5	2	14	29	135	311	173	241	254	94
Confinement on bread & water	0									0	0	0

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APPENDIX 2

TYPES OF PUNISHMENT IMPOSED BY ARMY COMMANDERS (1 October-31 December 1963) (By Grade)

	Totals	Officers	W/O	E-9	E-8	E-7	E-6	E-5	E-4	E-3	E-2	E-1
Oral admonition or reprimand	4,835			0	2	32	127	573	910	1,823	978	348
Written admonition or reprimand	192	25	4	0	2	7	25	60	23	36	10	0
Restriction												
14 days or less	18,389	1	0	0	5	28	155	1,127	2,885	8,604	4,334	1,250
15 days or more	1,584	4	4	1	1	8	45	247	196	522	449	107
Extra duties												
14 days or less	19,154			2	1	5	73	743	2,880	9,452	4,659	1,339
15 days or more	1,236			0	0	4	13	97	137	434	449	102
Correctional custody	93									49	37	7
Arrest in quarters	128									47	67	14
Reduction in grade												
From E-5 or higher	921			1	10	33	145	732				
From E-4 1 grade or lower	9,477								2,206	6,887	384	
Over 1 grade	154								49	105		
Detention of pay												
\$149.00 or less	461	0	0	0	0	3	15	49	81	209	93	11
\$150.00 or more	43	1	0	0	0	2	1	10	7	11	8	3
Forfeiture of pay												
\$74.00 or less	16,431	8	2	3	9	58	366	1,873	2,832	6,339	3,946	995
\$75.00 or more	1,385	24	3	2	12	51	134	373	159	280	290	57
Confinement on bread & water.	7									5	2	0

APPENDIX F

ARTICLE 15

SUPPLEMENTARY ACTIONS TAKEN BY ARMY COMMANDERS (1 April-30 June 1963)

Punishments upon which action taken		Suspended at time imposed	Suspended after imposed	Vacations of suspensions	Mitigations	Demerits	Punishment set aside
Written admonition or reprimand.		128	13	6	6	2	9
Restriction	14 days or less	569	61	22	34	56	47
	15 days or more	109	78	19	21	38	13
Extra duties	14 days or less	483	49	27	25	59	46
	15 days or more	56	56	13	7	25	11
Correctional custody.	7 days or less	3	0	1	0	0	2
	8 days or more	5	4	1	2	20	2
Arrest in quarters		1	0	0	0	0	0
Reduction in grade.	From E-5 or higher	383	35	52	20	17	25
	From E-4	1,203	130	199	75	20	74
	1 grade or lower	55	9	18	18	4	9
Detention of pay.	Over 1 grade	27	8	3	4	5	5
	\$149.00 or less	39	7	2	6	0	1
Forfeiture of pay.	\$150.00 or more	649	59	60	46	31	58
	\$74.00 or less	59	26	4	14	8	14
Confinement on bread & water.	\$75.00 or more	0	0	0	0	0	0
	\$75.00 or less	0	0	0	0	0	0
TOTALS		3,768	535	427	278	285	319

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APPENDIX G

SUPPLEMENTARY ACTIONS TAKEN BY ARMY COMMANDERS (1 October-31 December 1963)

Punishments upon which action taken		Suspended at time imposed	Suspended after imposed	Vacations of suspensions	Mitigations	Remissions	Punishment set aside
Written admonition or reprimand.		2	1	0	1	3	1
Restriction	14 days or less	233	41	17	15	86	75
	15 days or more	63	23	4	10	24	20
Extra duties	14 days or less	207	22	9	20	67	73
	15 days or more	34	14	7	5	20	11
Correctional custody.		2	0	0	0	0	1
8 days or more		5	0	0	0	0	0
Arrest in quarters		0	0	0	0	0	0
Reduction in grade.	From E-5 or higher	330	28	42	4	0	9
	From E-4	1,426	184	201	33	0	99
	1 grade or lower	27	0	0	0	0	0
Detention of pay.	Over 1 grade	43	1	0	8	9	13
	\$149.00 or less	3	3	0	3	1	1
Forfeiture of pay.	\$150.00 or more	478	44	58	102	63	114
	\$74.00 or less	88	29	25	38	14	14
Confinement on bread & water.		1	0	0	0	0	0
TOTALS		2,942	400	364	241	306	431

APPENDIX H

ARTICLE 15

ACTION BY ARMY COMMANDERS AND JUDGE ADVOCATES
UPON APPEALS (1 April-30 June 1963)

	Totals	Granted	Part granted	Denied
Referred to Judge Advocates	723	74	115	534
Not referred to Judge Advocates ..	902	91	159	652
FINAL TOTALS	1,625	165	274	1,186

APPENDIX I

ACTION BY ARMY COMMANDERS AND JUDGE ADVOCATES
UPON APPEALS (1 October-31 December 1963)

	Totals	Granted	Part granted	Denied
Referred to Judge Advocates				
Not referred to Judge Advocates ..	869	161	328	380
FINAL TOTALS	1,432	194	419	819

A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE

BY
CAPTAIN HARVEY WINGO**
AND
FIRST LIEUTENANT JAY D. MYSTER***

I. INTRODUCTION

This supplement covers the cases decided by the United States Court of Military Appeals during the October 1963 term, 18 October 1963 through 18 September 1964. The purpose of the annual supplement is to present a concise statement of substantive and procedural issues of importance which the Court of Military Appeals has considered during the term.

II. JURISDICTION

In *United States v. Baker*,¹ the Court of Military Appeals declared that the Federal Juvenile Delinquency Act,² was inapplicable to the armed forces and stated that all active duty military personnel are subject to the *Uniform Code of Military Justice*. The rationale for such a decision was that "the nature of the military's mission allows no special classification for minors," and the *Uniform Code of Military Justice* "does not differentiate between accused on the basis of age."³ Accused in this case, at the time of the offense and at the time of trial, was seventeen years of age.

* The opinions and conclusions expressed herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency. For previous supplements, see Schiesser and Barrett, *A Supplement to the Survey of Military Justice*, 24 MIL. L. REV. 125 n. 1 (1964).

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¹ 14 U.S.C.M.A. 311, 34 C.M.R. 91 (1963).

² 18 U.S.C. §§ 5031-37 (Supp. V 1963).

³ Accord, *United States v. Waters*, 14 U.S.C.M.A. 323, 34 C.M.R. 103 (1963); *United States v. Thieman*, 14 U.S.C.M.A. 326, 34 C.M.R. 106 (1963); *United States v. Pitts*, 14 U.S.C.M.A. 327, 34 C.M.R. 107 (1963); *United States v. McAndrews*, 14 U.S.C.M.A. 327, 34 C.M.R. 107 (1963).

On appeal it had been contended by defense counsel that the court-martial was without jurisdiction to try the accused because, as a seventeen year old, he could only be proceeded against under the Federal Juvenile Delinquency Act.

The Court of Military Appeals had occasion to consider another aspect of jurisdiction over the person of an accused in *United States v. Scheuneman*.⁴ The accused, a German citizen, testified that he had entered the United States on two occasions under a visitor's visa. Upon entering the second time he registered with a Selective Service Board under the provisions of the Universal Military Training and Service Act.⁵ Within a few months of registration accused was inducted. The Court of Military Appeals refused to consider whether the period exceeding one year specified in the statute must refer to one continuous period of residence in the United States or could refer to a period ascertained by tacking together two or more visits of an alien to the United States. The case was disposed of on other grounds. In view of an unbroken line of decisions in the Federal courts and in the Court of Military Appeals the accused was "in no position to contend that he [was] not subject to military law," as he had complied with the direction of his draft board in reporting as ordered for induction, had taken the physical examination, had been inducted by the prescribed ceremony, entered upon his military duties, obeyed orders, drawn pay, and accepted promotion and leave. The accused having complied with these requirements was "lawfully and properly, 'actually inducted' and became subject to military law."

Citing *United States v. Hooper*,⁶ and stating it is mindful of the Supreme Court's decision in *Reid v. Covert*,⁷ which invalidated the provision of Article 2, *Uniform Code of Military Justice*, extending general courts-martial jurisdiction to civilian dependents in foreign lands, the Court of Military Appeals in *United States v. Bowie*,⁸ restated the conclusion that "retired persons receiving pay [are] sufficiently identified with the military community to allow Congress to treat them as an integral part of the armed forces subject to its constitutional authority" Defense counsel's argument that a person retired for physical disability should be considered differently than the normal member was rejected. No distinction is made in the *Uniform Code of Military Justice* be-

⁴ 14 U.S.C.M.A. 479, 34 C.M.R. 259 (1964).

⁵ 62 Stat. 604 (1948), as amended, 50 U.S.C. APP. §§ 451-473 (Supp. V 1963).

⁶ 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

⁷ 354 U.S. 1 (1957).

⁸ 14 U.S.C.M.A. 631, 34 C.M.R. 411 (1964).

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tween retirees "on the basis of the reason for retirement." Thus, "all retirees receiving pay are subject to its provisions."

III. PRETRIAL AND TRIAL PROCEDURES

A. CHARGES AND SPECIFICATIONS

1. Delay in Preference of Charges.

An accused asserted for the first time before a board of review in *United States v. Schalck*⁹ that he was denied military due process when he was confined for 96 days without being charged. The board of review found that the record was "devoid of any data detailing the reasons" why Articles 10 and 33, *Uniform Code of Military Justice*, were not complied with, and it set aside the findings of guilty and ordered all charges dismissed. The Court of Military Appeals decided that the board of review was correct in its decision that the accused did not waive the delay in preferring charges by his failure to raise the issue at the time of trial or by his plea of guilty. However, "the board was not correct in summarily dismissing the charges against the accused on the factor alone of delay in preferring charges, when the Government, because the issue was not raised at trial, was never accorded a hearing upon the question."

The Court also rejected an accused's contention that he was denied military due process by his confinement for 79 days without charges in *United States v. McKenzie*,¹⁰ where the record established that the delay was occasioned by the necessity to locate accused's records, which were in his custody when he absented himself without leave. It became necessary to obtain from jurisdictions as scattered as Korea and Fort Bragg the evidence regarding the charge ultimately alleged, as well as information upon which to conduct the defense. However, the Court emphasized the duty and responsibility of every officer to comply with the unambiguous command of Article 33," *Uniform Code of Military Justice*.

⁹ 14 U.S.C.M.A. 371, 34 C.M.R. 151 (1964).

¹⁰ 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964).

"When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reason for delay."

2. *Sufficiency.*

A board of review pointed out in *United States v. Wade*¹² that Article 123a created only two offenses in connection with the making, drawing or uttering of bad checks: first, the use of a check to obtain something of value with "an intent to defraud" and, secondly, the use of a check to satisfy a past indebtedness or for any other purpose with an "intent to deceive." The Court of Military Appeals agreed that the board of review had correctly interpreted the offenses specified under Article 123a. Stating that "an intent to deceive [is] not identical to an intent to defraud," the Court held that a specification did "not set forth a violation of the first subsection" of Article 123a where it alleged an intent to deceive rather than an intent to defraud. The Court further held that the phrase "for any other purpose" in the second section of Article 123a was not intended to ("encompass the writing of a check in order to obtain any article or thing of value," as articles of value are dealt with by the first section of Article 123a and Were not intended to be contained within the words "for any other purpose" in the second section of that article. The intention of Congress was to "create only two bad check offenses" and was not to create a "hybrid crime consisting of the intent taken from one section of the article and the purpose from another." The Court held, however, that the board of review was incorrect in its determination that the lesser included offense of dishonorable failure to maintain sufficient funds in violation of Article 134 could be approved. Distinguishing the *Margelony* case,¹³ the Court held that, in the absence of the necessary allegations to constitute an offense under Article 123a, the specifications did not fairly apprise the accused of a charge which could be brought under Article 134. In summary, the Court held that "military law presently provided for three bad check offenses. Two of these crimes are specifically delineated in Article 123a. The third is found in the dishonorable failure to maintain sufficient funds on deposit to meet a check upon its presentment."

In *United States v. Granberry*,¹⁴ the Court of Military Appeals, affirming the board of review, held that allegations contained in

¹² 14 U.S.C.M.A. 507, 34 C.M.R. 287 (1964).

¹³ *United States v. Margelony*, 14 U.S.C.M.A. 55, 33 C.M.R. 267 (1963). The Court dealt with the issue whether an ordinary charge in violation of Article 123a included, as a matter of law, lesser offenses under Article 134. The specification had charged the making or uttering of a worthless check with intent to defraud. Such specification was held to have properly alleged a violation of Article 123a.

¹⁴ 14 U.S.C.M.A. 512, 34 C.M.R. 292 (1964).

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the specifications were sufficient to support a forgery charge under Article 123, *Uniform Code of Military Justice*. It was noted by the Court that it was quite clear that the specifications pointed out that the instrument allegedly forged was a check within the meaning of the NIL and the Law Merchant, and that the check, if genuine, would "operate to the legal prejudice" of the one whose name was forged thereto. In such a case it is not necessary that the specific quoted language of the *Uniform Code of Military Justice* be inserted into a specification in order to make that specification valid. The true test of the sufficiency of the indictment is whether it contains the elements of the offense intended to be charged and sufficiently apprises the accused of the charge being brought against him and protects him against double prosecution. In the present case there appeared to be no doubt that the specification sufficiently notified the accused of the offense with which he was being charged and contained the elements of the offense, as the checks were set out in full in the specification. The holding in *Granberry*" was not in conflict with the statements made in the *Wade* case¹⁶ as *Wade* was merely an attempt to limit the scope of the offenses chargeable under Article 123a and was not intended to have a general effect upon the drawing of charges and specifications.

In a special court-martial certified case, *United States v. Sadinsky*," the Court held that a specification which alleged that the accused "did, wrongfully and unlawfully, . . . through design jump from the U.S.S. INTREPID, into the sea," properly alleged a "military disorder violative of Article 134, Uniform Code of Military Justice," as it "adequately set forth the offense charged, sufficiently apprised accused of what he must be prepared to meet, and the record accurately reflected[ed] the extent to which he might claim jeopardy in any future case."

B. PRETRIAL ADVICE TO CONVENING AUTHORITY AND COMPOSITION OF COURTS-MARTIAL

In *United States v. Crawford*,¹⁸ it was found that on the day before trial, accused, through his counsel, informed trial counsel that he desired to exercise his right to have enlisted members on the court. The request was transmitted to the staff judge advocate, who told his deputy to obtain from the Adjutant General's Office

¹⁶ *Ibid.*

¹⁶ See note 12, *supra*, and text accompanying.

¹⁷ 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

¹⁸ 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

a list of "senior noncommissioned officers who were regarded as responsible and available for court-martial duty." The staff judge advocate also asked that the list include at least one member of the Negro race because the accused was a Negro and the alleged assaults were on white soldiers. Subsequently, a written list "with the names of Negro nominees marked with asterisks" was given to the chief of staff. No Negro on the list was chosen, but the general asked by name for a Sergeant Jones, believed to be a Negro. But Jones was not a Negro, and two other enlisted men believed to be Negroes were suggested by the Adjutant General. One was not of that race, and the other was rejected because two members of the court were of the same command. A Negro sergeant first class was finally selected and added to the court on the day of trial. The staff judge advocate stated that his "sole purpose was to obtain 'court members with integrity and common sense,' and he believed his method was designed to achieve that purpose better than 'willy-nilly' selection from a list."

The issues presented to the Court were: (1) whether this practice amounted to an intentional and systematic exclusion of enlisted men from the court and, as such, amounted to denial of military due process; and (2) whether the court was improperly constituted as a result of intentional inclusion of a Negro on the court. Chief Judge Quinn concluded that under the *Uniform Code of Military Justice* all enlisted men are eligible for court-martial membership. He noted, however, that a convening authority has a "large measure of discretion" under the Code in determining who is best qualified to serve as a court member, and "beyond the specific statutory exclusions, a method of selection which leaves out part of those nominally within the scope of eligibility is not necessarily unlawful."¹⁹ Thus, stated Judge Quinn, "a method of selection which uses criteria reasonably and rationally calculated to obtain jurors meeting the statutory requirements for service is proper. Such a system does not threaten the representative nature of the panel." Although he believed that judicial notice could be taken that many enlisted persons below the senior non-commissioned ranks are "literate, mature in years, and sufficiently judicious in temperament to be eligible to serve on a courts-martial," he indicated that the lower enlisted ranks "will not yield potential court members of sufficient age and experience to meet

¹⁹ See *Gorin v. United States*, 313 F.2d 641 (1st Cir. 1963), *cert. denied*, 374 U.S. 829 (1963), where voter lists were upheld as "sources for eligibles." But see, *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), where the court was careful to note that an irrelevant reason cannot be used to exclude a substantial group of otherwise qualified persons from service in the jury system.

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the statutory qualifications for selection, without substantial preliminary screening.” Concluding that the only purpose in looking to the senior noncommissioned ranks was to obtain persons “possessed of proper qualifications to judge and sentence an accused,” he found no intent “to exclude any group or class on irrelevant, irrational, or prohibited grounds.” As to the intentional selection of a Negro, Judge Quinn pointed out that intentional exclusion and intentional inclusion are quite different and stated that if intentional inclusion of qualified persons is discrimination, it is “in favor of, not against, an accused.”²⁰

Judge Kilday concurred in a separate opinion; stating that the convening authority in forming the court-martial need only comply with applicable provisions of the *Uniform Code of Military Justice*. After tracing the legislative history of Article 25, Judge Kilday concluded that the convening authority in the instant case acted in conformity with the provisions of the Code. Noting that the selection of court members is within the sound discretion of the convening authority, he concluded that qualifications enumerated in Article 25²¹ tend to be found in senior noncommissioned officers, and found there was no abuse of discretion. Finally, Judge Kilday concurred in the conclusion that the convening authority’s deliberate appointment of a Negro enlisted man as a member of the court-martial did not result in a violation of the appellant’s right to military due process.

Judge Ferguson dissented. He concluded that ~~as~~ the convening authority limited his choice of court members to senior noncommissioned officers and did not make his selection from all eligible members, he acted contrary to the Code. He also concluded that Federal cases which he believes applicable, have consistently condemned “systematic, arbitrary, and discriminatory exclusion of [qualified] classes from jury service.” Thus, the court was not properly constituted. It was also his conclusion that race is an impermissible criterion for selection of jurors, either by exclusion or inclusion, and thus it was error for the convening authority to include a Negro solely by reason of his race.

²⁰ *Accord*, *United States v. Glidden*, 15 U.S.C.M.A. 62, 35 C.M.R. 34; *United States v. Mitchell*, 15 U.S.C.M.A. 59, 35 C.M.R. 31; *United States v. Pearson*, 15 U.S.C.M.A. 63, 35 C.M.R. 35; *United States v. Ross*, 15 U.S.C.M.A. 64, 35 C.M.R. 36, all decided September 18, 1964; Quinn concluded on the basis of *Crawford, supra*, note 18, that there was no evidence that the selection of senior NCO’s improperly excluded enlisted men in the lower grades.

²¹ *UNIFORM CODE OF MILITARY JUSTICE* [hereinafter cited as UCMJ] art. 25(d) (2).

C. COMMAND INFLUENCE

A Navy pamphlet entitled "Additional Instructions for Court Members" was issued before trial by a **staff** legal officer of the convening authority to members of a court-martial in the case of *United States v. Johnson*.²² Two boards of review had condemned portions of the same pamphlet in two other cases. The Government here conceded that some portions left "room for improvement" but contended that members of the court in this case were not "influenced adversely." The Court of Military Appeals stated that "pretrial orientation . . . has a worthwhile place in the court-martial system" if properly used as a "general orientation" on the operation of courts-martial. However, the Court emphasized that the numerous cases challenging "the 'command control' aspects of pamphlets and lectures presented to court members before trial" indicate that "too many lecturers and pamphleteers allow their zeal to carry them into a discussion of matters that are of no concern to a court-martial." The "apparent existence of 'command control,'" in the Court's view, "is as much to be condemned as its actual existence," and "any doubt should be resolved in favor of the accused." The pamphlet in this case was found to go beyond "permissible pretrial guidance," but the Court acknowledged that this did not automatically "deprive the court-martial of power to proceed." The accused's guilty plea in this case, said the Court, eliminated the possibility that the pamphlet prejudiced the court-martial. However, noting that the convening authority had expressed a "willingness" prior to trial to approve a much lighter punishment, and that the sentence adjudged by the court-martial was "three times as severe as that which the convening authority believed to be appropriate," the Court could not say that the accused had not been prejudiced as to the sentence by the material appearing in the additional instructions.

Actual or apparent command influence was again condemned by the Court of Military Appeals in *United States v. Fraser*.²³ In this situation post trial affidavits showed that the convening authority initially intended to suspend execution of a bad conduct discharge for six months and to direct the accused's commitment to confinement facilities "for purposes of rehabilitation training." The convening authority so informed his **staff** judge advocate who, after "coordinating" with higher headquarters, told the convening authority that rehabilitation of persons convicted of larceny was

²² 14 U.S.C.M.A. 548, 34 C.M.R. 328 (1964).

²³ 15 U.S.C.M.A. 28, 34 C.M.R. 474 (1964).

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“contrary to the policy” at higher headquarters; that the accused should not be sent to the confinement facilities in question; that attempts would be made to withdraw him if he were sent there; and that if he successfully rehabilitated himself, his assignment to a Tactical Air Command Base would be prevented if possible. The convening authority then decided against his earlier determination. The Court of Military Appeals emphatically condemned this “injection of an actual or apparent command policy into the sentencing process” and held there was prejudicial error in denying accused an “individualized review.” It was then stated that the error could be cured only by disapproval of the bad conduct discharge. The remainder of the sentence and the findings were approved.

D. PLEAS AND MOTIONS

1. *Pleas of Guilty.*

In *United States v. Thomas*,²⁴ the Court of Military Appeals held in a per curiam opinion that it was error for the president of a special court-martial to fail to inquire into the providence of a plea of guilty to wrongful appropriation of clothing where the facts tended “strongly to negate the criminal intent required.” During the course of the sentencing procedure it had been brought out that the accused had merely gone to the room of “his friend,” had “borrowed” the clothing and had left a signed note to this effect, but had been apprehended before he could return it.

The Court held in *United States v. Gosset*²⁵ that a plea of guilty to being found drunk on duty was improvidently entered. The evidence established that the accused “inquired of a senior nurse ‘how much would be needed for an overdose of’ a particular tranquilizing drug,” and that accused told a medical corpsman that he was taking “about 2 pills every 5 minutes.” Later, accused had been hospitalized. Defense counsel argued that the accused took the tranquilizer “only for its designed and intended purpose,” and that he had ascertained its “results and use” before ingestion. Some difficulty was perceived by the Court “in predicating criminal liability for intoxication on duty upon what is claimed to be no more than an accidental overdose of a tranquilizer taken for the purpose of calming one’s nerves,” as there would have been no basis for prosecution if a physician had prescribed the tranquilizer. It was held that under the circumstances the president

²⁴ 14 U.S.C.M.A. 223, 34 C.M.R. 3 (1963).

²⁵ 14 U.S.C.M.A. 305, 34 C.M.R. 85 (1963).

of the special court should have ordered the plea changed to not guilty or given the accused opportunity to withdraw his inconsistent statements.

The accused, in *United States v. Harrell*,²⁶ stated, by way of mitigation or extenuation to a charge of dishonorable failure to maintain funds, that his account was held jointly with his wife, that she handled the check book and all other matters in connection with the account, and that he was not aware of the deficiency in his account until return of the checks to him. The Court concluded that these statements were inconsistent with accused's plea of guilty, requiring either that the plea "be set aside or that such representations on his behalf be withdrawn." Here, where there had been no inquiry into the providence of the guilty plea, the findings of guilty would not stand, and were set aside.

In *United States v. Politano*,²⁷ a determination that an accused had "no absolute right" to withdraw a guilty plea was held to be "wholly in conformity with the rule followed in Federal practice." The withdrawal of a guilty plea, said the Court, "is not allowed as a matter of right, but is within the sound discretion of the trial court." In this case the defense had interposed several preliminary motions for relief, and when they were denied had entered pleas of not guilty to all offenses (three worthless check offenses, a failure to obey a lawful order, bigamy, and communicating a threat). During the trial the accused changed his pleas to guilty. After findings of guilty on all counts, accused, during presentencing procedure, made a statement relative to the bad check offenses which was inconsistent with his plea of guilty. The law officer, as a result of this statement, ordered accused's plea of guilty as to the bad check offenses to be changed to not guilty. Defense immediately requested that all guilty pleas be changed to not guilty, but this was denied. The defense argued that the law officer, "by insisting accused's pleas of guilty as to the checks be withdrawn against his wishes, had placed accused in a position of no longer being able to throw himself on the mercy of the court." The Court of Military Appeals found no abuse of discretion on the part of the law officer, but noted that the result might have been different if the law officer had told the accused that he could

²⁶ 14 U.S.C.M.A. 517, 34 C.M.R. 297 (1964).

²⁷ 14 U.S.C.M.A. 618, 34 C.M.R. 298 (1964).

²⁸ FED. R. CRIM. P. 11, 32(d), closely parallel provisions of the Code and Manual pertinent to entry and withdrawal of guilty pleas. See UCMJ art. 45(a); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1961 [hereinafter cited as MCM, 1951] para. 71a-b; *United States v. Kepperling*, 11 U.S.C.M.A. 280, 29 C.M.R. 96 (1960).

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withdraw a plea of guilty at any time prior to announcement of a sentence.

2. *Speedy Trial.*

In *United States v. Broy*,²⁹ defense counsel moved at trial to dismiss because of (1) a lack of a speedy trial (three months) and (2) cruel and unusual punishment inflicted upon the accused while in pretrial confinement. Both motions were denied. The Court of Military Appeals held that although “cruel and unusual punishment inflicted upon the accused before trial by Government agents as part of a ‘willful, purposeful, vexatious,’ scheme to impede the accused in preparation of his defense is a relevant consideration on a motion to dismiss for denial of a speedy trial,” there was no evidence that the treatment of the accused in this case was “part of a deliberate plan to impede the accused in the preparation of his defense, or that it had that effect.” Therefore, although the law officer may have erred in failing to consider the evidence as to mistreatment in determining undue delay, there was no prejudice to accused.

3. *Continuance.*

An accused was convicted by a general court-martial of rape. The law officer in the case denied a defense request for a two-day continuance to check into the background of a “surprise witness” for the prosecution whose testimony was “a strong link in the chain of evidence against the accused.” The Court of Military Appeals granted review in the case, *United States v. James*,³⁰ to consider the question of prejudice to the accused in the denial of his motion. It appeared that the witness and his testimony were not totally unknown to the accused, as the defense counsel had access to the witness’ military record, had questioned him and his first sergeant and personnel officer, and had an opportunity to talk with his company commander. Further, the Court found that “nothing was presented to indicate the defense intended affirmatively to challenge the substance of [the witness’] testimony, although it involved a transaction with the accused.” The Court concluded that, on the facts presented, they could not say as a matter of law that the law officer abused his discretion in denying the motion for a continuance.

²⁹ 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964).

³⁰ 14 U.S.C.M.A. 247, 34 C.M.R. 27 (1963).

In a certified case, *United States v. Massey*,³¹ the issue discussed was whether the accused was prejudiced by the denial of an application to continue the trial until requested military counsel could return from emergency leave. The facts indicated that the assistant defense counsel, a first lieutenant, was substituted for the defense counsel, a captain, ten days before the trial, at the captain's request and for his benefit. The substitution was agreed to by a civilian defense counsel, who did not allege or imply that he was not prepared to try the case or that he needed the captain for any special reason. The lieutenant did not allege that he was unprepared to assist civilian counsel, and he had consulted with civilian counsel and actively participated in the case. The Court opined, on the facts presented above, that the law officer did not abuse his discretion in denying a motion for continuance.

4. *Mistrial.*

The Court of Military Appeals held in *United States v. Liberator*³² that a defense motion for a mistrial made after the sentence had been announced, based on the ground that "unauthorized persons had intruded on the court members while they were in closed session deliberating on the findings," was properly denied. It appeared that a sergeant from the base legal office had entered the closed session, after voting on the findings had taken place, to bring the court members coffee, and that he stayed in the room "only momentarily." The Court concurred with the board of review that the facts "emphatically rebut the presumption of prejudice that otherwise flows from the entry of interlopers into a closed session on findings." The Court further noted that "accused's providently entered pleas of guilty are themselves sufficient to support the findings."

E. CONDUCT OF THE TRIAL

1. *Common Trial.*

The record in the case of *United States v. Davis*³³ did not indicate either that it was erroneous to order the accused to be tried in a common trial with two other enlisted men or that "any prejudice resulted therefrom to any of the parties." The Court stated that the transcript revealed a "series of assaults by the three accused upon different victims which constituted 'offenses . . . committed at the same time and place and . . . provable by the

³¹ 14 U.S.C.M.A. 486, 34 C.M.R. 266 (1964).

³² 14 U.S.C.M.A. 499, 34 C.M.R. 279 (1964).

³³ 14 U.S.C.M.A. 607, 34 C.M.R. 387 (1964).

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same evidence,” and it found “nothing to indicate any inconsistency in the accused’s defenses or the slightest unfairness in their joinder.” The Court commended the law officer in the case for his exploration of possible prejudice flowing from the common trial; for offering each accused the services of separate counsel, which they declined; for his cautionary instructions to the court-martial to insure that the members considered the guilt of each accused separately; and for submitting the accused’s positions properly to the court.

2. *Right to Counsel.*

In *United States v. Cutting*,³⁴ the accused, who was convicted by special court-martial in accordance with his plea of guilty, had requested a “military lawyer” but was informed that none was available. The Court held that although an accused at a special court-martial does not have an absolute right to qualified counsel, “he does have the right to have “military counsel of his choice” represent him if reasonably available.³⁵ The initial determination as to availability is personally made by the convening authority, with the right of appeal to the next higher authority. If the determination is unfavorable to the accused, he may renew his request at trial and preserve the issue for appellate review. The Court declined to apply the doctrine of waiver in this case. It stressed that “convening and supervisory authorities should be extremely liberal in furnishing qualified counsel” in special courts-martial, particularly in cases in which a bad conduct discharge can be adjudged. It was further pointed out that there is a need for the orderly development of the facts in the record with respect to the refusal of an accused’s request for military counsel. As the record of trial in this case did not indicate the reasons for unavailability of military counsel, the decision of the board of review was reversed and a rehearing authorized. It seems clear that the principles elucidated in this case also apply to a request for individual counsel in a general court-martial.

Following a guilty plea the accused in *United States v. Broy*³⁷ had been convicted by a general court-martial of issuing bad checks. A failure of the defense counsel to bring the evidence of accused’s mistreatment while in the brig to the attention of the

³⁴ 14 U.S.C.M.A. 347, 34 C.M.R. 127 (1964).

³⁵ See *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963).

³⁶ UCMJ art. 38(b).

³⁷ 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964). See text accompanying note 29 *supra*.

members of the court-martial in mitigation of the sentence required a reversal. The obligation of the defense counsel, concluded the Court, continues through imposition of the sentence, and "that obligation is not satisfied by obtaining before trial the agreement of the convening authority to disapprove so much of the sentence as exceeds a specified maximum." Counsel should "present such evidence as is known and is available to him, which would manifestly and materially affect the outcome of the case."

3. *General.*

The law officer in a rape case, *United States v. Sanders*,³⁸ gave a proper instruction on aiders and abettors and, subsequently, in response to an inquiry from the court members, repeated that instruction and added an instruction on "the liability of one whose duty it is to interfere and whose noninterference is designed by him to operate as an encouragement to or protection of the perpetrator." This began a discussion between the law officer and the trial and defense counsel during which the law officer stated:

[I]f you believe that the accused didn't know what was going to happen at the time, . . . he did not have a duty to interfere, . . . his testimony is not contraverted, according to his testimony, whether you believe it or not, if you seek to believe his testimony, his testimony is that he did attempt to interfere.

The Court held that the new instructional material "placed upon the accused the burden of refuting an issue concerning which the Government had presented no evidence." If the government was contending that accused had a duty to interfere, said the Court, it had the burden to "offer proof of dereliction . . . and not the accused's role to show either that he had no obligation or that he performed in accordance with his responsibility." Chief Judge Quinn dissented, holding that the instructions presented "no fair risk that the court members were confused or uncertain as to the issue they had to decide."

In *United States v. White*,³⁹ where a charge of false swearing was based upon accused's denial of homosexual conduct in a statement made under oath, and there had subsequently been a confession by the accused with regard to that homosexual conduct, the law officer erred in instructing the court with regard to a method of proving false swearing that was inapplicable in that case. The instruction was as follows:

I will read the entire third category which is as follows: By documentary evidence directly disproving the truth of the allegedly falsely

³⁸ 14 U.S.C.M.A. 524, 34 C.M.R. 304 (1964).

³⁹ 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964).

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sworn statement. However, the—such documentary evidence must be corroborated by testimony or by circumstances tending to prove the falsity of the allegedly falsely sworn statement unless the document is an official record shown to have been well known to the accused at the time he **took** the oath or unless it appears that the documentary evidence was in existence before the allegedly false statement was made and that such evidence sprang from the accused himself or was in any manner recognized by him as containing the truth. In such a case, it may be inferred that the accused did not believe the allegedly falsely sworn statement to be true.

The error was held to be prejudicial because there was “a fair **risk** the court members were led to believe that less or no corroboration was required in order to find the accused **guilty**, in view of the nature of his sworn statements to the Office of Naval Intelligence.” The Court considered that the court-martial may have treated the accused’s confession as an “official record” in determining the falsity of the prior statement upon which the false swearing charge was based.

IV. MILITARY CRIMINAL LAW

A. SUBSTANTIVE OFFENSES

1. *Assault.*

In *United States v. Redding*,⁴⁰ the accused and the victim had adjacent sentry posts and were each armed with a .38 caliber pistol. When they undertook to “demonstrate their proficiency in drawing pistols,” believing the weapons were unloaded, the accused’s pistol fired and struck the victim in the chest. The following items of interest were contained in the opinion with respect to the charge of assault with a dangerous weapon:

(1) An assault with a dangerous weapon is not a specific intent offense but rather is a general intent crime which may be established by a showing of culpable negligence.

(2) The definition of culpable negligence in the *Manual for Courts-Martial, United States, 1951*,⁴¹ was approved.

(3) The defense of “accident” is not applicable to assault where the act which resulted in the assault was itself unlawful.

2. *Conspiracy.*

In *United States v. Beverly*,⁴² the question was raised as to the

⁴⁰ 14 U.S.C.M.A. 242, 34 C.M.R. 22 (1963). See also MCM, 1951, para. 207a.

⁴¹ Para. 198b.

⁴² 14 U.S.C.M.A. 468, 34 C.M.R. 248 (1964).

sufficiency of the evidence to support a charge of conspiracy. The accused were convicted by a general court-martial of larceny of two drone engines, willful destruction, and conspiracy to commit larceny. The prosecution established that five completely equipped drones were stored in a bay aboard the U.S.S. Hancock. A week later two engines were discovered to be missing, and about a year later the same two were found in a storage space aboard the ship. A sailor assigned to the ship testified that several months after the engines were discovered to be missing, he and the two accused had hidden the equipment in the storage cache and that he had been offered one of the engines. Reversing the board of review, the Court held that the sailor had learned of the theft after the conspiracy had ended. They further concluded that there was "no evidence" in the record, other than the confession of the accused and the testimony of the sailor, "that the offense of conspiracy had probably been committed by someone, since an accused cannot be legally convicted upon his uncorroborated confession or admission and since other confessions or admissions of the accused are not such corroborative evidence." The Court in a caveat pointed out that they have "noticed an increasing trend in the military to charge, in addition to the substantive offense, the crime of conspiracy where two or more accused are believed to have committed an offense in concert." The Court referred to an opinion by Mr. Justice Jackson ⁴³ in which he "suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

The Court in a lengthy opinion, *United States v. Kauffman*,⁴⁴ where an Air Force captain had been convicted of offenses arising out of his association with agents of East Germany, castigated the OSI for their conduct with respect to a search of the accused's quarters, eavesdropping upon his telephone conversations with civilian counsel, and the conduct of the trial, at which signaling was detected between a prosecution witness and someone in the courtroom. The Court was unanimous in concluding, with respect to the conspiracy charge, that the specification was sufficient to allege the offense of conspiracy. However, they found that there was no evidence in the record that an overt act was committed by any party to the alleged conspiracy. In reaching this conclusion, the Court rejected the government's contention that the "receipt and acceptance of [a] 'cover address' was an overt act separate from the agreement." The evidence that a report was prepared

⁴³ *Krulwich v. United States*, 336 U.S. 440, 445 (1948).

⁴⁴ 14 U.S.C.M.A.283, 34 C.M.R. 63 (1963).

and transmitted to Russia concerning the dealings with the accused was also rejected as an overt act, as the evidence failed to "point out in what manner such a report could effect the object of the conspiracy or how it could be a manifestation that the conspiracy is at work.":

3. *Desertion.*

In *United States v. Merrow*,⁴⁵ the accused was found guilty of desertion with "intent to shirk important service, 'namely, participation in Operation Deep Freeze 1962.'" The accused was a cook on a U. S. Coast Guard cutter participating in an operation "to provide 'logistic support' to the U. S. Antarctic Research Program." The accused's ship acted as an icebreaker and "transported military and civilian personnel to and from [the] bases" involved in the operation. The accused contended that, as a matter of law, the service involved was not "important service" within the meaning of Article 85 of the *Uniform Code of Military Justice*. The Court held that, under the circumstances of this case, it could not say as a matter of law that the accused's duty was not "important service" within the meaning of the Code, and the court-martial could reasonably find that the duty was in fact "important service." The Court recognized that "unauthorized absence from a unit engaged in an 'important service' mission does not itself establish desertion with the intent to shirk important service." However, the fact that the unit was engaged in important service in this case appeared to be the "moving force behind the accused's unauthorized absence."

The question of "important service" was again considered in *United States v. McKenzie*.⁴⁶ The accused, whose specialty was that of the usual infantryman, was shown to have been ordered in the ordinary course of duty to a replacement center in Korea. In answering a certified question, the Court held that what was made out was nothing more than an intent to avoid "the ordinary everyday service of every member of the armed forces stationed overseas." The mere fact that the service avoided was in Korea was not enough to characterize the accused's service as "important," as what is lacking is "the something more," that distinguishes important service from ordinary everyday service of the same kind.

⁴⁵ 14 U.S.C.M.A. 265, 34 C.M.R. 45 (1963).

⁴⁶ 14 U.S.C.M.A. 361, C.M.R. 141 (1964).

4. *Forgery.*

The Court found in *United States v. Whitson*⁴⁷ that the evidence in the case established that a "Pay Out Slip" used in connection with the payment of slot machine jackpots "represented money in the special fund of the Airmen's Club," as it discharged the liability of the accused, who was the club cashier, to the club for money given him, and "each slip affected the legal liability of the club custodian as to the funds in his possession, and obligated the Central Accounting office to turn over to the Noncommissioned Officers' Club a corresponding amount of money." Accordingly, the slips were held to be "instruments within the forgery Article" of the *Uniform Code of Military Justice*. The Court rejected the contention that the slips were "an integral part of a gambling transaction," as the acts were not "carried out as part of the game, and did not establish rights of the participants *inter se*" and the slips had "apparent [legal] efficacy."

The case of *United States v. Phillips*⁴⁸ involved a scheme to defraud an insurance company by filling in false applications for insurance in the name of an individual soldier, without his knowledge or consent, attaching a false carbon copy of an authorization for institution of an allotment to pay the premiums, and forwarding the completed forms to the insurance company. The insurance agent then received "a drawing account" and the accused received a commission from the agent. The accused **was** charged with larceny, forgery, and using the mails to defraud. He was convicted of forgery but acquitted of the remaining charges. The subject of the forgery was the carbon copy of the allotment form which contained a faint reproduction of the forged signature. The original, which is the only copy required by finance regulations to be signed, was destroyed and the copy, which is prepared solely for the allottee's own records, was the one sent to the insurance company. The Court concluded that the carbon copy could not be the subject of the forgery, because this copy had no "legal efficacy" either with respect to the insurance company or the government. Government counsel attempted to argue before the Court that it was the original copy which it was alleged the accused had forged. The Court rejected this theory and held that, while an original allotment form could be the subject of a forgery, the case had been tried on the theory that the accused had forged the copy. Accordingly, the Court dismissed the charges.

⁴⁷ 14 U.S.C.M.A. 324, 34 C.M.R. 104 (1963); *accord*, *United States v. Williams*, 14 U.S.C.M.A. 375, 34 C.M.R. 155 (1964).

⁴⁸ 14 U.S.C.M.A. 620, 34 C.M.R. 400 (1964).

5. *Larceny.*

In *United States v. Sluss*,⁴⁹ the evidence was held not to establish the intent required to support a wrongful appropriation conviction. The evidence disclosed that the accused, an aircraft maintenance man, properly obtained the aircraft oxygen bottle in question for use in an aircraft being serviced, but he later discovered it was not needed and placed it in the trunk of his car, where it was found some five months later. Accused testified, with corroboration by another maintenance man, that the bottle was retained "for future use." Other witnesses testified that they knew of no other use for the bottle and that, although the bottle should have been returned to supply, it was not uncommon for maintenance men to keep supplies for future use. Although five months appeared to be an unusually long time to retain the item, the Court did not consider that, by itself, this fact was sufficient to demonstrate the necessary intent. Stating that wrongful appropriation requires more than a mere withholding of property, and that the act must be "accompanied by an 'intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner,'" the court dismissed the charge.

In a special court-martial, *United States v. Cassey*,⁵⁰ the issue concerned asportation rather than intent. The Court stated that the stipulated facts established that the accused had an agreement with another, whose duties involved the issuance of linens, for delivery to accused at the salvage yard a quantity of government sheets. Accused prepared a false receipt for the property, indicating its turn-in as salvage rags. In the meantime, the person who delivered the sheets had notified the OSI, and delivery of the sheets was accomplished only with its acquiescence. Rejecting the defense contention that the offense of larceny was not committed "either because the United States, through its agents, consented to the taking or because the needed asportation was incomplete," the Court stated that the agents possessed no power to consent to the taking of the property and their actions could not bind the government. The Court held that the facts in this case established the "accused's exercise of dominion over the sheets and, hence, their asportation." The Court further held that the stipulated evidence established that the "criminal design in question originated with the accused," and that the government "agents did not induce the crime, nor did they urge the accused on in its commission."

⁴⁹ 14 U.S.C.M.A. 388, 34 C.M.R. 168 (1964).

⁵⁰ 14 U.S.C.M.A. 558, 34 C.M.R. 338 (1964).

In another special court-martial, *United States v. Barnes*,⁵¹ the stipulated proof showed that the accused wrote checks on a bank in which he had no account. The Court held that "the obtaining of money or property of another, with intent to steal, by means of a false pretense, constitutes larceny"⁵² and that the "false pretense involved may take the form of a worthless check." The defense claimed that the President of the United States had "eliminated from the *Manual for Courts-Martial, United States, 1951*, language dealing with worthless checks as constituting a false pretense" under Article 121 and that this indicated that "these thefts are considered by the Executive to be preempted" by Article 123a. The Court held that the "President has no authority to create or eliminate substantive offenses" under the Code and that "an Executive interpretation may be disregarded" if it attempts to change the statute. The Court then concluded that the accused was punishable either under Article 121 or Article 123a and that the doctrine of preemption is not involved when an act violates two or more statutes. Accordingly, as the "accused cannot select the statute under which he will be prosecuted," he could not "complain if . . . prosecuted for violating the statute that carries the higher penalty."

In a per curiam decision, *United States v. Morgan*,⁵³ where the accused stated that an undershirt was apparently returned to him with his clean laundry and that he was "unaware it was in his locker," the Court held it was prejudicially erroneous to instruct that a withholding may arise from a failure to return or deliver the property to its owner when a return or delivery is due and to advise the court-martial "regarding the 'presumption' arising from the possession of recently stolen property," without amplification or tailoring to the particular case.

In *United States v. Grant*,⁵⁴ an accused testified he had purchased a typewriter from "an unknown hitchhiker," believing at the time of the purchase that it had been "stolen from the base at which he was stationed," and that he pawned it, intending to redeem it later and return it to the base. The Court held, in a per curiam opinion, that it was prejudicially erroneous to instruct the court: ". . . that an intent to steal, which is in a sense the same as to say permanently deprive, is implicit [in the] wrongful intentional dealing with the property of another and [in] a

⁵¹ 14 U.S.C.M.A. 567, 34 C.M.R. 347 (1964).

⁵² See UCMJ art. 121.

⁵³ 14 U.S.C.M.A. 364, 34 C.M.R. 144 (1964).

⁵⁴ 15 U.S.C.M.A. 13, 34 C.M.R. 459 (1964).

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manner likely to cause him to suffer a permanent loss thereto. Consequently a person may be guilty of larceny even though he intends to return the property ultimately, if the execution of that intent depends upon future conditions or contingencies which is (sic) not likely to happen within a reasonable limited period of time. He also may be found guilty of larceny who conceals the property of another with the intent to retain it until a reward is offered for it, or who pawns the property without authority and intends to redeem it at an uncertain future date and then return it."

6. Sodomy.

In a certified case, *United States v. Kindler*,⁵⁵ the accused was convicted of assault with intent to commit sodomy. The convening authority approved only the findings of guilty of "an indecent, lewd, and lascivious act." The Court held that the commission of an "indecent, lewd and lascivious act" was, under the facts of this case, a lesser included offense of the sodomy charged.

B. DEFENSES

1. Honest Mistake.

In *United States v. Brown*,⁵⁶ accused was found guilty of, among other things, dishonorable failure to place or maintain sufficient funds in his bank account to pay three checks upon presentment, in violation of Article 134. The checks were written on 9, 12 and 17 August 1963, and the evidence indicated that the accused initiated an allotment to his bank on 15 July 1963. The money was withheld from his July pay, and the accused was informed that the allotment would reach his bank "at least the middle of August." Apparently, the allotment application was delayed at the Finance Center. The Court held that the evidence raised "a substantial issue of mistake of fact concerning whether accused made and uttered the checks in question in the honest and not grossly indifferent belief that their payment would be met by automatic deposit of his forthcoming allowance checks." Accordingly, the failure of the law officer to instruct on the affirmative defense of mistake of fact was found to have resulted in prejudicial error.

Earlier in the term, in *United States v. Tucker*,⁵⁷ an accused was found guilty of four specifications of wrongful appropriation

⁵⁵ 14 U.S.C.M.A. 394, 34 C.M.R. 174 (1964).

⁵⁶ 14 U.S.C.M.A. 633, 34 C.M.R. 413 (1964).

⁵⁷ 14 U.S.C.M.A. 376, 34 C.M.R. 166 (1964).

and eleven specifications of larceny as a result of his receipt, retention, and use of basic allowance checks mailed to his home. He was not entitled to these checks "by reason of being assigned to and occupying government quarters during the period involved." As the accused contended that his wife has received the first five checks without his knowledge, the Court held that the law officer prejudicially erred in instructing on mistake of fact, as the theory presented by the accused never raised that issue. Rather, the accused "completely disassociated himself from any participation in the offenses alleged." By the instruction, said the Court, the court-martial was permitted "to equate" accused's "knowledge" of whether his wife had received the checks with his own "guilt of the offenses charged when it . . . was no more than a circumstance bearing on [the accused's] criminal liability."

2. *Self-defense.*

In a certified case, *United States v. Campbell*,⁵⁸ the "relative fighting abilities" of the accused and the injured party and their "temperament, and proclivity for fighting" were held to be "among the proper considerations in the determination of who may have been the aggressor and whether self-defense was reasonably raised by the evidence." Thus, the law officer was found to have erred in refusing to instruct on self-defense, where the evidence showed that the incident in question occurred shortly after a prior incident during which the victim "struck" the accused. The evidence indicated that the accused had done nothing more than make a "smart remark" in attempting to push past the victim in a narrow passage and had not attacked him in any manner. It required several men to restrain the victim and get the accused past him to his sleeping quarters. The accused expressed fear of the victim at that time. Accused prepared his bunk in the sleeping quarters to look as though he were in it, but he retired to another bunk, purportedly to avoid injury by the victim, who occupied the same quarters. When the victim entered the quarters, the accused asked who it was, and a fight ensued in which the victim was cut. The accused also suffered injuries, possibly more serious, and was underneath the victim when the fight terminated. The victim claimed he was cut immediately after identifying himself and turning around, but another witness testified the victim stepped towards the accused before the fight began. There was also testimony that the accused had a reputation as a passive person, while the victim, a champion wrestler, had the reputation of being belligerent. The victim was,

⁵⁸ 14 U.S.C.M.A. 383, 34 C.M.R. 163 (1964).

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in fact, under restriction at the time as the result of a Court-martial sentence for forcibly resisting apprehension by armed forces police.

The Court of Military Appeals passed upon a self-defense instruction in an assault case in *United States v. Lombardi*.⁵⁹ In a per curiam opinion, the Court found that an instruction on self-defense, incorporating the "like degree of force" principle, placed upon the accused the "burden of proving that he did not use a degree of force greater than that exerted against him . . . and that the degree of force he did use was only such [as] was necessary to protect himself from attack. This is "not the accused's burden," said the Court, and the instructions were prejudicial where the president of the special court-martial "did not relate" the rule as to reasonable doubt "to the affirmative defense of self-defense."

With respect to a law officer's instructions on self-defense in *United States v. Gordon*,⁶⁰ the Court held that advising the court-martial that, before self-defense was available, the accused must have "retreated as far as he could in safety" was erroneous and prejudicial.

3. Mental Responsibility.

The accused in *United States v. Jensen*⁶¹ was a full colonel, who "indulged in gambling sprees at casinos in Reno, Nevada," and who wrote worthless checks to finance these escapades. He had done this periodically in the past and had managed to pay off heavy losses. In issue was the mental responsibility of the accused and particularly his ability to adhere to the right. The government's psychiatrists in their testimony made references to using the definitions in *Air Force Manual 160-42, Psychiatry and Military Law*. The law officer instructed on the effect that expected "immediate detection and apprehension" would have on accused's ability to adhere to the right. The Court held that in the military the "ultimate test for mental responsibility is ability to distinguish right from wrong and to adhere to the right, and while the hypothetical effect of immediate detection and apprehension may play a proper role in cross-examination and as a factor to be considered by the court-martial in its deliberations on the issue, it cannot

⁵⁹ 14 U.S.C.M.A. 466, 34 C.M.R. 246 (1964).

⁶⁰ 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963).

⁶¹ 14 U.S.C.M.A. 353, 34 C.M.R. 133 (1964).

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be made the subject of a governing instruction or used to limit the testimony of expert witnesses.”⁶²

Another “policeman at the elbow” decision was *United States v. Alphin*.⁶³ While conceding error in the instruction using the immediate detection and apprehension principle, the government urged that the “error was harmless, as all the expert witnesses were agreed that the accused would not have been deterred by the prospect of immediate detection and apprehension,” and thus “could not have been misled by the instruction of the wrong standard.” In affirming the decision of the board of review setting aside the findings and ordering a rehearing, the Court pointed out that the government’s position overlooked the fact that a court-martial is “not limited to the testimony of expert witnesses” in resolving an issue of mental responsibility and that their opinions are not binding upon it. The Court concluded that from all of the evidence presented, the fact finders may well have found that, “despite the psychiatric testimony,” the accused “would have been deterred” by the circumstance mentioned in the instruction.“

4. *Res Judicata*.

The accused in *United States v. Doughty*⁶⁴ was first tried by special court-martial upon charges of drunken driving and operating his automobile in violation of an order to the contrary. At this trial a Private B testified that he was driving the vehicle at the time in question. The accused, nevertheless, was found guilty of driving the automobile in violation of the order but was acquitted of the drunken-driving charge. Private B was then tried by general court-martial for perjury, based on his testimony at Doughty’s special court-martial, and was acquitted. In the instant case, the accused had been tried by general court-martial for subornation of perjury and obstructing justice. The subornation of perjury charge was in connection with Private B’s testimony at the special court-martial. The trial defense counsel contended that Private B’s “acquittal of perjury barred Doughty’s conviction for subornation” of perjury on the grounds of *res judicata*. The law officer did not agree. The Court concluded that Doughty’s acquittal of drunken-driving was not based on a determination that the accused was not driving the car, for, in order to find him guilty of violat-

⁶² *Accord*, *United States v. Jordan*, 14 U.S.C.M.A. 393, 34 C.M.R. 173 (1964).

⁶³ 14 U.S.C.M.A. 14, 34 C.M.R. 460 (1964).

⁶⁴ For still another case on a “policeman at the elbow” instruction, see *United States v. Moore*, 14 U.S.C.M.A. 418, 34 C.M.R. 198 (1964).

⁶⁵ 14 U.S.C.M.A. 540, 34 C.M.R. 320 (1964).

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ing the order not to drive, the court-martial must have found he had driven the car. The Court, however, held that Doughty's conviction of subornation of perjury was barred by Private B's acquittal of perjury, because proof of perjury was "essential" to accused's guilt in this case. The Court recognized that "*res judicata* applies only between the same parties," but concluded that, because of the "nature of the offense" of subornation of perjury, there was "privity" between Doughty and Private B, and the law officer "should have allowed accused's plea of *res judicata*." The subornation charges were dismissed and the record returned.

In *United States v. Cadenhead*,⁶⁶ two accused were convicted of robbery by a general court-martial. Previously, Japanese authorities had notified American authorities that they intended to exercise jurisdiction, and proceedings were in fact initiated in the Japanese Family Court, where proceedings are considered to be "educative" rather than "criminal" in nature. Because the accused were "foreigners," a decision was entered in the Japanese court to release them without application of the "educative" provisions of the Japanese law. The accused contended that trial by court-martial ~~was~~ barred (1) because of the double jeopardy provisions of the Status of Forces Agreement with Japan and (2) because, under the Status of Forces Agreement, the Japanese government had the primary right to exercise jurisdiction and did not waive that right. Affirming the decision of the board of review, the Court held (1) that the proceedings against the accused in the Japanese Family Court did not constitute a "trial" within the meaning of the double jeopardy provision of the Status of Forces Agreement, and (2) that the nature of the Japanese disposition of the case "left the United States free to exercise its own criminal jurisdiction over the accused," even though the record did not show formal notification to United States authorities of the "determination to release the accused without criminal prosecution."

5. Accident.

In *United States v. Femmer*,⁶⁷ an accused was charged with assault in which grievous bodily harm was intentionally inflicted, but was convicted of assault with a dangerous weapon. At the trial, accused admitted he "knew he had a razor blade in his hand" and that he had "used that hand in a calculated effort to push [the victim] away from him." The Court held that no instructions on the defense of accident were required, as the injury resulted

⁶⁶ 14 U.S.C.M.A. 271, 34 C.M.R. 51 (1963).

⁶⁷ 14 U.S.C.M.A. 358, 34 C.M.R. 138 (1964).

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“from an act intentionally directed” at the victim, so that “accident of the kind that would absolve one of criminal liability ‘was not involved.’ ”

6. *Lack of Wrongfulness.*

Accused in *United States v. West*⁶⁸ was convicted on one specification of wrongful possession of narcotic drugs. In issue was whether the law officer committed prejudicial error in refusing to submit a purported defense of lack of wrongfulness to the court-martial.

The evidence introduced at trial tended to establish the following facts: A small leather bag containing a vial of narcotic drugs bearing pharmacy labels from the local dispensary was found in front of the barracks in which the accused lived. The accused testified that he had taken the bag of drugs to his barracks for safekeeping after failing to place it in the pharmacy safe. He also “indicated it must have dropped from his pocket as he entered the barracks.” The bag was apparently an “overage” bag, in which drugs in excess of quantities shown on the inventory records were placed until those records could be corrected during monthly audits. Such overages assertedly occurred frequently because of administrative errors. The possession of the so-called overage bag was shown to be in violation of applicable Air Force regulations relating to the safeguarding of narcotics and their inventory. Defense counsel sought an instruction on “mistake of fact, based upon accused’s asserted belief that he thought it right and proper to take the narcotics to his room for the purpose of safeguarding them and that maintenance of the overage bag was pursuant to the pharmacy’s policy.” He also requested the law officer to instruct the court that “the element of wrongfulness involved in the offense” imported “criminal action or criminality” on the part of the accused. The law officer denied the request on the basis that “wrongful possession of narcotics ‘imports possession which is not authorized, period.’ ” The Court said that possession of narcotics is “presumed to be wrongful” in the absence of a satisfactory explanation. If such explanation “is believed by the jury and shows a *lawful* possession of the drugs, the accused is entitled to be acquitted.” The Court concluded that the accused’s testimony in this case, if believed by the court members, showed a “lack of wrongfulness of the kind contemplated by the offense.”

⁶⁸ 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964).

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V. EVIPENCE

A. SEARCH AND SEIZURE

In *United States v. Simpson*⁶⁹ the accused was convicted of absence without leave, thirteen specifications of larceny by check, and eight specifications of issuing bad checks with intent to defraud. When the accused was apprehended for being absent without authority, the following documents were taken from him: a book of blank checks and stubs, nine of which bore serial numbers corresponding to checks allegedly issued by the accused with fictitious names; three checks with the date, amount and signature of a drawer filled in and the payee left blank; and two hand-written documents stating the accused's intention to commit suicide. Subsequently, the accused, after being warned under Article 31, voluntarily gave an OSI agent samples of his handwriting. At the trial, there was expert testimony establishing that the same individual executed the checks involved in the specifications and the documents taken from the accused when he was apprehended. In this regard, the suicide notes were admitted in evidence as handwriting samples, but the expert testified that the notes were not necessary to support his conclusions. The Court of Military Appeals held that, as the search was incident to a lawful arrest, it was legally permissible, and articles found in the course of the search could be seized if they were proper objects of a search and seizure. The Court further held that items can legally be seized even though they relate to an offense different from that concerning which the search is conducted. Turning to an examination of the nature of the items seized in this case, the Court found that the checkbook fell within the seizable class because it was an instrumentality of the crime of larceny and that the checks could be seized to prevent future offenses. Finally, assuming the suicide notes had mere evidentiary value and were not properly seized, the Court held that their admission was not prejudicial, as they were only cumulative of other convincing evidence of the accused's authorship of the checks, including the accused's own admissions and confession.⁷⁰

In *United States v. Westmore*⁷¹ a criminal investigator told the accused that he would "like" to search his effects and, at the inves-

⁶⁹ 15 U.S.C.M.A. 18, 34 C.M.R. 464 (1964).

⁷⁰ Judge Ferguson dissented, stating that the seizure of the two suicide notes was "clearly improper" and that their admission in evidence was "specifically prejudicial" because there was a risk that they affected the deliberations of the court-martial.

⁷¹ 14 U.S.C.M.A. 474, 34 C.M.R. 254 (1964).

tigator's request, the accused directed the investigator to his barracks room and pointed out his locker. The Court held that there was no evidence that the accused had consented to the search, thus restating the principle that consent cannot be based upon a mere submission to authority. The Court also stated that the fact that the accused remained silent when the investigator told the accused's commanding officer that the accused had "apparently consented" to the search could not be considered as establishing consent, as the accused was in custody at the time and was "under no duty to dispute any statement" of the investigator. Finally, the Court held that "ratification of a search is not the equivalent of its authorization."⁷²

B. CONFESSIONS — WARNING OF RIGHTS UNDER ARTICLE 31 UCMJ

1. Issue of Voluntariness.

Testimony at a special court-martial trial for larceny⁷³ indicated that, during an authorized search of the accused's belongings, investigators seized several letters written to the accused by his wife and told the accused that they would probably have to contact his wife during the investigation. The investigators also told the accused, however, that they would not interrogate the accused's wife if there was any way it could be avoided. The accused then made a written confession which was received in evidence at the trial over a defense objection. The Court of Military Appeals held that the question of the voluntariness of the confession was in issue because the seizure of the letters, which were not instrumentalities or fruits of a crime, was illegal, and there was evidence from which the court could have found that the confession was made because of the manner in which the letters were used by the investigators. The Court added that the instructions of the president of the special court-martial should have been tailored to the evidence and issues in the case."

⁷² The decision of the board of review was reversed and a rehearing authorized. Chief Judge Quinn dissented on the theory that the other evidence of guilt was compelling.

⁷³ *United States v. Askew*, 14 U.S.C.M.A. 257, 34 C.M.R. 37 (1963).

⁷⁴ Chief Judge Quinn dissented. Compare *United States v. Rogers*, 14 U.S.C.M.A. 570, 34 C.M.R. 350 (1964), where the Court reviewed the circumstances surrounding the taking of accused's pretrial statement and held that the alleged promise by an investigator was no more than a generalized statement to continue the investigation and check out other leads. Such a promise, said the Court, is proper and cannot be grouped with the "illicit bargain" to induce a statement of an incriminatory nature. It is noted that the issue here was presented to the court-martial for its consideration.

In another special court-martial larceny case⁷⁵ the Court found that from the evidence the court-martial might reasonably have concluded that the accused was persuaded to confess "by the threat of receiving more severe punishment at the hands of civil authorities for his lack of cooperation and the alleged assurance that confessing his guilt would result in no prosecutory impediment to his already pending administrative discharge."⁷⁶ Refusing to apply the compelling evidence rule to the issue of voluntariness, the Court held that an issue of voluntariness was raised and that the president's failure to submit this question "in any meaningful way" for resolution by the court-martial was prejudicial error."

In a forgery case⁷⁶ the Court found error in the law officer's refusal to instruct the court members with regard to the voluntariness of the accused's statement to an OSI agent. The evidence showed that prior to making the statement several of the accused's superior noncommissioned officers and both his former and present commanding officers had told him that the case was closed and that they were not going to take any action, and the OSI agent had told him that a statement was desired "(for the purpose of closing the case." The Court considered that the court members could have found that the accused was "lulled into a false sense of security" by the unexplained delay in closing the case, assurances that there would be no further action against him, and the statement by the OSI agent, and that the accused admitted guilt "to eliminate the threat of prosecution."

2. Duty to Warn.

In *United States v. King*,⁷⁹ an air policeman, who apparently acted as liaison between civilian authorities and an Air Force base, obtained an oral confession from the accused without properly advising him of his rights under Article 31. The oral statement

⁷⁵United States v. Tanner, 14 U.S.C.M.A. 447, 34 C.M.R. 227 (1964).

⁷⁶ It is noted that the court-martial sentenced accused to bad conduct discharge.

⁷⁷ The issue of voluntariness was also involved in the case of *United States v. White*, 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964), where the Court stated that a "substantial issue of voluntariness may be raised by introduction into the interview of an accused or suspect the possibility of obtaining an administrative separation from the service in return for his admission of guilt" The Court stated, however, that where there is conflicting evidence surrounding the obtaining of the confession, and the law officer submitted the differing versions of the circumstances to the court under proper instructions for their resolution, the confession was not inadmissible as a matter of law.

⁷⁸United States v. Dalrymple, 14 U.S.C.M.A. 307, 34 C.M.R. 87 (1963).

⁷⁹ 14 U.S.C.M.A. 227, 34 C.M.R. 7 (1963).

was later transcribed by the civilian police, after a proper warning, for use by the civilian authorities. At the trial by general court-martial, the law officer instructed the court-martial that the air policeman was not required to give the accused an Article 31 warning if he secured the statement while "acting as an agent or instrument of the civilian authorities." The Court held that the law officer's instruction was erroneous, for the air policeman was subject to the *Uniform Code of Military Justice*, and, "suspecting accused of the very offenses with which he was ultimately charged, interrogated him concerning these crimes." The decision of the board of review was reversed and a rehearing was authorized.

A certified case, *United States v. Murphy*,⁸⁰ involved the admission in evidence of a written statement made to an agent of the Treasury Department. The agent had properly warned the accused before the statement was given, but prior to that warning the accused's immediate superior noncommissioned officer had asked the accused, without first warning him under Article 31, whether he had committed the offense. The accused stated that he had and soon thereafter gave the written statement to the Treasury agent after the agent had warned him of his rights. The Court concluded that, despite the noncommissioned officer's statement that he had been at the interview "at his own request and not in any official capacity," the court-martial could have concluded that he had "accompanied accused as his military superior and participated in the interrogation on that basis," in which event he would have had to warn the accused under Article 31. Accordingly, the Court held that the law officer erred in failing to submit to the court-martial under proper instructions the question of whether the accused's superior noncommissioned officer had a duty to warn the accused of his rights and whether the accused's confession to the Treasury agent was made because of his earlier oral statement to the noncommissioned officer.

In a special court-martial case,⁸¹ where the accused was charged with disrespect toward a superior officer, failure to obey an order, and willful damage to a picture window in a noncommissioned officers' open mess, the Court held that the mess custodian was acting as custodian of the mess and not in the capacity of "a superior noncommissioned officer purporting to exercise disciplinary authority" over the accused nor as "a law enforcement official engaged in gathering evidence for prosecution of a crime," when he questioned the accused with regard to the broken window. Thus,

⁸⁰ 14 U.S.C.M.A. 535, 34 C.M.R. 315 (1964).

⁸¹ *United States v. Cross*, 14 U.S.C.M.A. 660, 34 C.M.R. 440 (1964).

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as the defense counsel at the trial was qualified within the meaning of Article 27(b) of the *Uniform Code of Military Justice* and did not object to the admission of the accused's statement, the general rule of waiver was applied by the Court.⁸²

C. HEARSAY

In *United States v. Gladwin*⁸³ the accused was found guilty of making and uttering worthless checks. At the trial the Government introduced two affidavits from the assistant manager of a bank as the person in charge of bank records. In the first affidavit, the affiant explained that as a result of a merger and change in name of the bank in which the original checking account was established, he became custodian of the banking entries. He also identified the dishonored checks, stated the reason for dishonor, and stated that the accused opened an account with a deposit of \$50.00 and that a search of the records revealed no further deposits by the accused. In the second affidavit the affiant identified a copy of the accused's bank statement. The accused contended that provisions of the *Manual for Courts-Martial, United States, 1951*,⁸⁴ providing that bank records, or a statement as to the absence of entries therein, may be authenticated by a notarized certificate of the person in charge of the entries, are unconstitutional because they deny an accused the right to confrontation under the Sixth Amendment. The Court held that broadening the rules of evidence to permit authentication of regular entries in bank records by a notarized certificate of the custodian is not in violation of the Sixth Amendment. The Court further held that, while portions of the affidavits in question went beyond the provisions of the *Manual* by the inclusion of inadmissible hearsay, under the circumstances of the case, admission of the affidavits did not result in prejudice to the substantial rights of the accused.⁸⁵ The Court

⁸² Judge Ferguson dissented, stating that he thought it was clear that the mess custodian was "in every sense of the word . . . acting in an official capacity and conducting an investigation when he obtained the incriminatory answer from accused."

⁸³ 14 U.S.C.M.A. 428, 34 C.M.R. 208 (1964).

⁸⁴ See paras. 143a(2), 143b, 144c (Addendum, 1963).

⁸⁵ "Other competent evidence established the checks' negotiation and return. Accused conceded as much and testified that he, after receiving notice of their dishonor, intended to have them again forwarded for payment. He realized his account had been 'slightly overdrawn,' and, in defense, he relied solely upon a cash deposit of \$350.00 to sustain his position that he wrote the checks in the honest belief that there would be sufficient funds to meet their payment upon presentment. This issue was properly submitted and resolved against him. Under these circumstances, we can find no prejudice flowing from use of the inadmissible portions of the exhibits in question." 14 U.S.C.M.A. at 435, 34 C.M.R. at 215.

did, however, "caution counsel from attempting to expand certification of business entries beyond appropriate limits."

In *United States v. Ayers*⁸⁶ the Court held that the law officer had properly excluded a log entry made by the duty NCO on the morning of the homicide, containing his opinion that the accused "was under the influence of Drug." With special exceptions, said the Court, "(such as the opinion of a pathologist in an autopsy report, a statement of opinion is not the kind of 'fact or event' entitled to admission in evidence as part of an 'official' record or business entry."

D. WITNESSES

1. *Accused as Witness.*

a. *Privilege not to testify.* The trial counsel in *United States v. Gordon*⁸⁷ made remarks to the effect that only the victim and the accused knew what happened and the deceased victim was not there to tell his side of the story. The Court held that these remarks were not impermissible comments by the prosecutor on the accused's failure to testify. Noting that the accused's pretrial statement contained his "version of events" and had been admitted in evidence, the Court stated that the remarks were "fair comment on the evidence," and that apparently this was the interpretation placed upon the comments by the parties at the trial, for no objection was made at the time of trial with regard to the remarks.

In another case,⁸⁸ prior to the findings, a court-martial member asked if any remark was required with regard to the accused taking or not taking the stand. The law officer had answered "immediately and spontaneously" that the accused was "not obligated to take the stand," that nothing would be said with regard to it, and that the remark of the court member was not to be considered by the court. The Court of Military Appeals emphasized that the question should not have been asked, and the law officer should have included in his statement to the court-martial language of Title 18, *United States Code*, Section 3481,⁸⁹ with regard to no presumption against the accused because of his failure to testify. The Court found, however, that the action of the law offi-

⁸⁶ 14 U.S.C.M.A. 336, 34 C.M.R. 116 (1964).

⁸⁷ 14 U.S.C.M.A. 314, 34 C.M.R. 94 (1963).

⁸⁸ *United States v. Farrington*, 14 U.S.C.M.A. 614, 34 C.M.R. 394 (1964).

⁸⁹ 18 U.S.C. § 3481 provides as follows:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

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cer and the instructions given were adequate to remove any possible prejudice.

b. *Cross-examination of accused.* In *United States v. Robertson*⁹⁰ cross-examination of the accused, who was charged with rape and housebreaking with intent to rape, brought out admissions of a prior attempt to enter a trailer for the purpose of committing adultery. The Court held that, **as** there was no showing that the accused had been convicted of the prior misconduct, cross-examination with regard thereto was prejudicial **error**.⁹¹

Stating that the Government was '(entitled to cross-examine not merely on the actual facts testified to by accused, but also on the reasonable inferences that can be drawn from those facts,' the Court in *United States v. Kindler*⁹² held that, where the accused had represented on direct examination that he was a "perfectly normal human being right now" and on the date of the alleged offense, and had testified that he believed that a homosexual act was a "sin," the trial counsel could properly inquire into a period of time earlier than that mentioned by the accused in his direct examination. The Court recognized that evidence of another act of misconduct in a prior period **may** be inadmissible as being too remote, but it noted that the matter is one "for the sound discretion of the law officer," subject only to review for abuse. In this case, where evidence of abnormal sexual behavior dated back to a time when accused was twelve to fourteen years old, the Court found that it was "reasonably calculated to refute the accused's direct testimony that he was now sexually normal and that he regarded a homosexual act as a sin." **As** the accused had "opened the door to inquiry about these acts," the rule expressed in the *Robertson* case was found to be inapplicable."

In *United States v. Miller*⁹⁴ the Court **restated** the general rule that "specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not **proper** subject of cross-examination for the purpose of attacking the credibility of an accused as a witness," but it further stated that compelling evidence

⁹⁰ 14 U.S.C.M.A. 328, 34 C.M.R. 108 (1963).

⁹¹ On the issue of prior acts of misconduct, see also *United States v. Conrad*, 14 U.S.C.M.A. 344, 34 C.M.R. 124 (1964), where the testimony of the detective who had arrested the accused for indecent exposure included conclusions the detective had drawn from his conversation with accused that accused had committed prior acts of the same nature. The Court held that the law officer's failure to give limiting instructions with regard to the testimony was prejudicial.

⁹² 14 U.S.C.M.A. 394, 34 C.M.R. 174 (1964).

⁹³ Judge Ferguson would have ordered a rehearing, stating that "it was prejudicially improper to parade such acts of misconduct before the court-martial."

⁹⁴ 14 U.S.C.M.A. 412, 34 C.M.R. 192 (1964).

of guilt may render cross-examination of that nature non-prejudicial. In this case, the Court also held that it is the content of the accused's testimony on direct examination, and not his announcement of his intent to limit the scope of the evidence he gives on direct examination, that controls the limit of cross-examination of the accused. Thus, where the admissibility of accused's confession was not made an issue by the evidence given by him, and where his direct testimony actually went to the merits of the prosecution, that testimony opened the subject of his guilt to cross-examination.

2. *Testimony of Accomplice.*

In *United States v. Winborn*,⁹⁵ where the accused had been convicted of mail theft, the Court held that the law officer committed reversible error in refusing to give a requested instruction on the credibility of accomplice witnesses, when the testimony of the accomplice alone supplied the necessary corroboration to the accused's confession and the accomplice was the only witness against the accused.⁹⁶

3. *Right to Compel Attendance of Witnesses.*

The fact that the defense in *United States v. Sweeney*⁹⁷ refused the prosecution's offer to stipulate did not deter the Court from looking into the nature of the testimony requested by the defense to be given in person. Stressing that each case must be decided on an individual basis and that an abuse of discretion on the part of the law officer must be found in order to reverse, the Court in this case found that the law officer committed an abuse of discretion in refusing to allow personal attendance of character witnesses. Evidence of this nature, said the Court, is admissible on the merits and may raise a reasonable doubt as to the accused's guilt. The personal demeanor of a character witness on the stand is important, and this, of course, is lost without the personal attendance of the witness. The character evidence in question in this case, together with the other evidence, convinced the Court that attendance of the character witnesses in the case may have "tipped the balance in favor of accused."⁹⁸

⁹⁵ 14 U.S.C.M.A. 277, 34 C.M.R. 57 (1963).

⁹⁶ Chief Judge Quinn dissented, stating that in view of his confession under oath, the accused was not prejudiced by the law officer's refusal to instruct on accomplice testimony.

⁹⁷ 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

⁹⁸ The Court also held in this case, involving larceny from a ship's store, that there **was** no abuse of discretion in refusing to allow the personal attendance of witnesses to testify that other unauthorized persons could have had access to the ship's store, since even if others stole some of the goods in question, "it would not relieve the accused from responsibility" but would merely "lessen the total **loss** attributable" to him.

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4 *Examination of Witnesses by the Court.*

In *United States v. White*⁹⁹ the Court held that where the accused was charged with the theft of aircraft maintenance tools and the president of the special court-martial questioned two mechanics to bring out that loss of tools would hamper their work in alert situations, the accused, who had, pleaded guilty, did not have a fair hearing on the question of punishment. The Court found it "impossible to conclude that the president's advocacy of a major aggravating factor did not weigh heavily in the court's determination" to include a punitive discharge in the sentence.

5. *Testimony under a Grant of Immunity.*

A grant of immunity which required a witness to testify to specific matters contained in his written pretrial statement and quoted in the grant was held to contravene public policy and to make the witness incompetent to testify "so long as he labors under its burden, for, regardless of the truth of the matters concerning which he had knowledge, he was bound to reiterate his pretrial declarations in order to obtain the reward which had been tendered him."¹⁰⁰

6. *Husband and Wife.*

The accused in *United States v. Moore*¹⁰¹ was charged with four assaults on his wife. In issue was whether, in view of her objection, the wife was properly compelled to testify against her husband. Acknowledging that the United States Supreme Court has determined that a wife who has been transported in interstate commerce by her husband for the purpose of prostitution, in violation of the Mann Act, can be compelled to testify against him, the Court pointed out that the decision in that case was based upon "special 'legislative judgment underlying' the Mann Act," and it found no similar Congressional policy involved in a prosecution for assault and battery. Accordingly, the Court held that the accused's wife was improperly compelled to testify against him. The Court then went on to hold that the accused had "standing to seek re-

⁹⁹ 14 U.S.C.M.A. 610, 34 C.M.R. 390 (1964).

¹⁰⁰ *United States v. Stoltz*, 14 U.S.C.M.A. 461, 34 C.M.R. 241 (1964); *United States v. Kinney*, 14 U.S.C.M.A. 465, 34 C.M.R. 245 (1964).

¹⁰¹ 14 U.S.C.M.A. 635, 34 C.M.R. 415 (1964).

versal of his conviction because of the erroneous denial of the wife's privilege to refuse to testify." ¹⁰²

E. INFERENCES

In a premeditated murder case ¹⁰³ evidence was presented that an autopsy showed fifteen knife wounds on the face, back, and chest of the victim. The law officer gave the following instruction: "In connection with this matter you are further instructed that a vicious assault resulting in multiple serious injury is evidence of a premeditated design to kill. This evidence is not conclusive, however, but is to be considered along with all the other evidence in the case." The Court held that there was "no reasonable risk" that the instruction was considered by the court as anything other than advice as to the "permissible inference which could be drawn from the facts surrounding the homicide."

At a trial for wrongful cohabitation ¹⁰⁴ there was evidence that the accused was living with one woman and documentary evidence that he was married to another woman. The accused's pre-trial statement acknowledged his marriage to and non-divorce from the other woman. Under these circumstances, the Court held that the evidence justified an inference of the accused's non-marriage to the woman with whom the evidence showed he was living.

F. DEPOSITIONS

Oral depositions of two Spanish nationals were received in evidence in *United States v. Donati* ¹⁰⁵ over the defense objection that the accused's civilian defense counsel was not present at their taking and that prior thereto the military defense counsel had requested a delay until the civilian counsel could be present. Another deposition was taken on one hour and forty-five minutes notice to the accused aboard ship. A board of review held that it was error to admit the depositions in evidence, but stated it was not prejudicial

¹⁰² The Court also examined MCM, 1951, para. 148e, which provides that the privilege not to testify "does not exist, and . . . the spouse . . . may be required to testify, if he or she is the victim of the transgression with which the other spouse is charged . . ." The Court found, however, that the language of the Manual in this respect left room to doubt the supposition that the drafters of the Manual were promulgating a new rule of evidence. Judge Kilday thought that the Manual provision was perfectly clear, but he concurred "With due regard for the principle of *stare decisis*" and "because of the importance of the question and the necessity that those in the field and at other appellate levels have a firmly settled rule to apply."

¹⁰³ *United States v. Ayers*, 14 U.S.C.M.A. 336, 34 C.M.R. 116 (1964).

¹⁰⁴ *United States v. Smith*, 14 U.S.C.M.A. 405, 34 C.M.R. 185 (1964).

¹⁰⁵ 14 U.S.C.M.A. 235, 34 C.M.R. 15 (1963).

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in light of other proof of the accused's guilt. The Court of Military Appeals concluded that the depositions were inadmissible because the accused was denied the right to be represented by his "chosen counsel" and denied due notice. The *Uniform Code of Military Justice*, said the Court, "insures free choice on the part of the accused to be represented by individual counsel, appointed counsel, or both." As, aside from the depositions, evidence against the accused was given only by an accomplice witness, the Court held that the admission of the deposition was prejudicial, reversed the decision of the board of review, and authorized a rehearing.

VI. SENTENCE AND PUNISHMENT

A. INSTRUCTIONS RELATING TO THE SENTENCE

In *United States v. Hutton*¹⁰⁶ the president of the special court-martial advised the court that the maximum punishment included a bad conduct discharge. However, the court members were not told that this serious penalty was permitted in the case only because of evidence of two previous convictions. The Court of Military Appeals concluded that the "atmosphere of the court's deliberations should have been illuminated by a full explanation of the reason for the increase in punishment, thereby permitting it properly to weigh all factors attending the sentencing process in a correct fashion."¹⁰⁷

Advising the court-martial with regard to the sentence in *United States v. Ellis*,¹⁰⁸ the law officer presented a lengthy dissertation, over defense objection, concerning his views as to the responsibilities of court members in determining a sentence and the factors which influence such a determination. He compared the court members' role with that of the federal judge and pointed out how court members do not have the advantage of "extensive information" developed by a presentence investigation to assist them in determining a proper sentence as does a federal judge. He indicated that such information is available to authorities acting upon a sentence subsequent to its imposition by the court. He explained how a court-martial has a much wider choice of punish-

¹⁰⁶ 14 U.S.C.M.A. 366, 34 C.M.R. 146 (1964).

¹⁰⁷ The decision of the board of review was reversed and the board was authorized to affirm a sentence not including bad conduct discharge or to order a rehearing on the sentence. Chief Judge Quinn dissented, stating in part: "The court chose discharge and maximum confinement as an appropriate sentence. That choice rendered wholly unimportant the specific means by which these components became part of the maximum sentence."

¹⁰⁸ 15 U.S.C.M.A. 8, 34 C.M.R. 454 (1964).

ments available to adjudge than does a federal judge and pointed out how the final sentence of a court-martial is indefinite until after consideration and action by the "convening authority, higher appellate courts, and other agencies of the government." The Court of Military Appeals was not persuaded by the fact that the law officer elsewhere in his instructions "expressly adverted to the responsibility of the court members and enjoined each to use his own judgment in the premises" or the fact that the sentence was reduced by the convening authority in accordance with a pretrial agreement, and it held that there was a fair risk that the law officer's instructions prejudicially influenced the court-martial in adjudging the sentence.¹⁰⁹

B. EFFECT OF POST TRIAL CLEMENCY RECOMMENDATIONS BY COURT MEMBERS

Where a clemency petition was signed after the trial by a majority of the court members, the Court stated that the petition was submitted "without any intention of intimating that the original sentence was invalid or erroneous in any way," and held that post trial clemency petitions "may not be used to impeach the imposed penalty."¹¹⁰

C. FINE AGAINST ENLISTED PERSONS IN LIEU OF FORFEITURES

In *United States v. Landry*¹¹¹ the sentence imposed on the accused enlisted man included a fine of \$2,500.00. A board of review held that the fine portion of the sentence was illegal because the sentence did not include a punitive discharge. In making this determination, the board was relying on paragraph 127c of the *Manual for Courts-Martial, United States, 1951*, which provides that "a fine may be adjudged against any enlisted person, in lieu of forfeitures, provided a punitive discharge is also adjudged." The Court held that as paragraph 127c of the *Manual* prescribes a "condition to the utilization of a particular type of punishment," it is "subject to the same condemnation as the provision directing that a sentence to forfeitures in excess of two-thirds pay per month must include a punitive discharge." The record was returned for reconsideration of the sentence by a board of review.

¹⁰⁹ See also *United States v. Kauffman*, 15 U.S.C.M.A. 17, 34 C.M.R. 463 (1964), involving similar instructions with the same result on petition to the Court of Military Appeals.

¹¹⁰ *United States v. Tucker*, 14 U.S.C.M.A. 376, 34 C.M.R. 156 (1964).

¹¹¹ 14 U.S.C.M.A. 553, 34 C.M.R. 333 (1964).

¹¹² See *United States v. Jobe*, 10 U.S.C.M.A. 276, 27 C.M.R. 360 (1959).

D. MULTIPLICITY

In a certified case ¹¹³ the Court held that charges of unlawfully opening mail matter and larceny of money from that mail were, for purposes of punishment, multiplicitious where there was only "one 'handling' of the mail, whether it be charged as a *taking* or *opening*, generated by a single impulse, or intent, to commit larceny." The Court distinguished *United States v. Real*,¹¹⁴ where the accused unlawfully opened mail out of curiosity and later decided to steal from it. In that case the Court held that the offenses were separately punishable.

In *United States v. Searles* ¹¹⁵ the law officer apparently considered that some of the findings were multiplicitious for purposes of punishment, for he instructed the court that the maximum confinement was twenty years when it would actually have been forty years if the findings were considered separately. He did not, however, give an instruction on multiplicity. The Court held that the adjudged penalty of the court-martial ¹¹⁶ was so far below the maximum stated by the law officer that it "provides compelling proof that the court members were not adversely disposed toward the accused by reason of the apparent number of offenses committed by him." ¹¹⁷

Where the instructions in another case ¹¹⁸ contained a statement on the correct maximum punishment that could be imposed, the Court held that the law officer's failure to inform the court "that the offenses found were the same for sentence purposes," did not result in prejudice to the accused.¹¹⁹

VII. POST TRIAL REVIEW

A. ACTION OF CONVENING AUTHORITY

In *United States v. White* ¹²⁰ the accused was sentenced to a bad conduct discharge, total forfeitures, confinement at hard labor for

¹¹³ *United States v. Kleinhans*, 14 U.S.C.M.A. 496, 34 C.M.R. 276 (1964).

¹¹⁴ 8 U.S.C.M.A. 644, 25 C.M.R. 148 (1958).

¹¹⁵ 14 U.S.C.M.A. 643, 34 C.M.R. 423 (1964).

¹¹⁶ Dishonorable discharge, confinement at hard labor for two years, and total forfeitures.

¹¹⁷ Judge Ferguson dissented, stating that, under the facts of the case, it seemed clear to him that "a fair risk exists the members may have concluded these findings called for a more severe penalty than would have been imposed had it been properly instructed."

¹¹⁸ *United States v. Deshazor*, 14 U.S.C.M.A. 667, 34 C.M.R. 447 (1964).

¹¹⁹ Judge Ferguson dissented on grounds that the instruction should advise the court that "the multiplicitious offenses of which it has convicted the accused are, in reality, one crime."

¹²⁰ 14 U.S.C.M.A. 646, 34 C.M.R. 426 (1964).

one year, and reduction to the lowest-enlisted grade. The convening authority set aside the confinement portion of the sentence, approved the remainder, and directed that the forfeitures "apply to pay becoming due on and after date of this action." The Court held that, as a sentence including an unsuspended punitive discharge cannot be ordered into execution until "affirmed by a board of review and, in cases reviewed by it, the Court of Military Appeals,"¹²¹ and as the convening authority approved no confinement, he could not apply the forfeitures to any pay of the accused "until promulgation of his final order of execution" upon completion of appellate review.

In *United States v. Fraser*,¹²² discussed above, command influence was found to have been injected into the post trial review.

B. APPELLATE REVIEW BY BOARDS OF REVIEW AND THE COURT OF MILITARY APPEALS

In *United States v. Patterson*¹²³ the Court held that error resulting from the law officer's failure to give instructions on the lesser included offense could be cured by affirming the lesser included offense, where the evidence sustained a finding of guilty of the lesser included offense only. The Court stated that "disapproval of the finding affected by the error eliminates all harm to the accused resulting from the error," and it was not necessary to order a rehearing or dismissal of the charges.¹²⁴

A board of review member concurred with one other member in approving findings of guilty and the sentence in *United States v. Patt*,¹²⁵ where the sentence included a bad conduct discharge that had been suspended with provision for automatic remission.

¹²¹ Citing UCMJ, art. 71.

¹²² 15 U.S.C.M.A. 28, 34 C.M.R. 474 (1964); see pp. 28-29 *supra*.

¹²³ 14 U.S.C.M.A. 441, 34 C.M.R. 221 (1964).

¹²⁴ *Accord*, *United States v. Morris*, 14 U.S.C.M.A. 446, 34 C.M.R. 226 (1964). In *United States v. Judkins*, 14 U.S.C.M.A. 452, 34 C.M.R. 232 (1964), the Court held that the accused was not prejudiced by the action of the board of review in reducing findings from unpremeditated murder to voluntary manslaughter, where the lesser offense had not been submitted to the court-martial. In *United States v. Rogers*, 14 U.S.C.M.A. 570, 34 C.M.R. 350 (1964), the charge was premeditated murder but the court-martial found the accused guilty of unpremeditated murder. A board of review concluded that the evidence showed that the homicide was caused by culpable negligence only and reduced the findings to involuntary manslaughter, despite the objection of the accused at trial that an instruction on involuntary manslaughter was inconsistent with his defense. The Court of Military Appeals found that there was sufficient evidence in the record of trial to support the determination of the board of review. *Accord*, *United States v. Bauer*, 14 U.S.C.M.A. 597, 34 C.M.R. 377 (1964).

¹²⁵ 14 U.S.C.M.A. 556, 34 C.M.R. 336 (1964).

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The board member further stated, however, that he thought a punitive discharge **was** inappropriate for the offense in question.¹⁸⁶ The Court held that this was “not necessarily” inconsistent but that appellate authorities should “spell out their positions with clarity and precision, so as to eliminate any possibility of misunderstanding.” Automatic remission **of** the bad conduct discharge in the interim was held to have removed any basis for challenging the board’s decision.

¹⁸⁶ The offense involved **was** breach of restraint imposed **under** Article 15.

APPENDIX
WORK OF THE COURT

The statistics in Tables I and II are official statistics compiled by the Clerk's Office, United States Court of Military Appeals, pursuant to the provisions of Article 67(g), *UniformCode of Military Justice*, and are maintained by that office on a fiscal year basis only. The statistics in Tables III through VI are unofficial figures compiled by the authors and cover published opinions in the period of this survey, the October 1963 term, 18 October 1963 through 18 September 1964.

Table I. Status of Cases Docketed

Total by Services	Total as of June 30, 1962	July 1, 1962 to June 30, 1963	July 1, 1963 to June 30, 1964	Total as of June 30, 1964
<i>Petitions (Art. 67(b)(9)):</i>				
Army	8,901	353	371	
Navy	3,398	268	302	
Air Force	3,641	204	176	
Coast Guard	41	2	2	
Total	15,981	827	851	
<i>Certificates (Art. 67(b)(2)):</i>				
Army	129	6	3	138
Navy	187	5	6	198
Air Force	53	9	8	70
Coast Guard	6	0	0	6
Total	375	20	17	412
<i>Mandatory (Art. 67(b)(1)):</i>				
Army	31	0	0	31
Navy	3	0	0	3
Air Force	3	0	0	3
Coast Guard	0	0	0	0
Total	37	0	0	a37
Total cases docketed	16,393	847	868	b18,108

a—2 Flag officer cases; 1 Army and 1 Navy.

b—17,818 cases actually assigned docket numbers. 121 cases counted as both Petitions and Certificates, 5 cases Certified twice, 154 cases submitted as Petitions twice, 2 Mandatory cases filed twice, 5 Mandatory cases filed as Petitions after second board of review opinion, 3 cases submitted as Petitions for the third time.

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Table II. Court Action

	To as une , 19	July 1, 1962 to June 30, 1963	July 1, 1963 to June 30, 1964	
<i>Petitions (Art. 67(b)(3)):</i>				
Granted	657	88	99	844
Denied	853	765	758	376
Denied by Memorandum				
Opinion	2	0	0	2
Dismissed	12	0	2	14
Withdrawn	321	6	5	332
Disposed of on Motion to Dismiss:				
With Opinion	8	0	0	8
Without Opinion	39	1	0	40
Disposed of by Order setting aside findings and sentence	3	0	0	3
Remanded to Board of Review	143	6	4	153
Court action due (30 days) ^c	88	57	38	38
Awaiting replies	25	21	25	25
<i>Certificates (Art. 67(b)(2)):</i>				
Opinions rendered	364	18	19	401
Opinions pending	3	2	1	1
Withdrawn	7	6	0	7
Remand	2	0	0	2
Set for hearing ^c	0	0	0	0
Ready for hearing	0	0	0	0
Awaiting briefs ^c	0	2	1	1
By Order	0	1	0	1

Mandatory (Art. 67(b)(1)):

Opinions rendered	37	0	0	0	37
Opinions pending	0	0	0	0	0
Remanded	1	0	0	0	1
Awaiting briefs	0	0	0	0	0
<i>Opinions rendered:</i>					
Petitions	1,414	89	84	1,587	
Motions to Dismiss	11	0	0	11	
Motions to Stay Proceedings	1	0	0	1	
Per Curiam Grants	27	2	1	30	
Certificates	321	17	15	353	
Certificates and Petitions	41	1	4	46	
Mandatory	37	0	0	37	
Remanded	2	0	0	2	
Petitions for a New Trial	2	0	0	2	
Petition for Reconsideration of Petition for New Trial	1	0	0	1	
Motion to Reopen	1	0	0	1	
Total	1,858	100	104	2,062	

d—2,071 cases were disposed of by 2,054 published opinions. 111 opinions were rendered in cases involving 63 Army officers, 26 Air Force officers, 15 Navy officers, 4 Marine Corps officers, 2 Coast Guard officers, and 1 West Point cadet. In addition 19 opinions were rendered in cases involving 20 civilians. The remainder concerned enlisted personnel.

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Table II Court Action—Continued

	Total as of June 30, 1962	July 1, 1962 to June 30, 1963	July 1, 1963 to June 30, 1964	Total as of June 30, 1964
Petitions denied	17,853	765	758	15,376
Petitions dismissed	12	0	2	14
Petitions withdrawn	321	6	5	332
Certificates withdrawn	7	0	0	7
Certificates disposed of by Order	0	1	0	1
Opinions rendered	1,850	109	104	2,063
Disposed of on motion to dismiss:				
With opinion	8	0	0	8
Without opinion	39	1	0	40
Disposed of by Order setting aside findings and sentence	3	0	0	3
Writ of Error Coram Nobis by Order	0	0	1	1
Remanded to board of review	144	6	4	154
Total	16,927	888	874	17,999

	CUMULATED DISPOSITIONS AND STATUS				
	June 30, 1962	June 30, 1963	June 30, 1964	June 30, 1965	June 30, 1966
Opinions pending	19	15	20		
Set for hearing	0	0	0		
Ready for hearing	0	0	1		
Petitions granted—awaiting briefs	14	9	10		
Petitions—court action due 30 days	88	57	38		
Petitions—awaiting replies	25	21	25		
Certificates—awaiting briefs	0	2	1		
Mandatory—awaiting briefs	0	0	0		
Total	146	104	95		

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Table III. Sources of Cases Disposed of by Published Opinions

	Army	Navy	Air Force	Coast Guard	Total
Petition -----	32	23	32	1	88
Certification -----	4	5	9	0	18
Mandatory Review -----	0	0	0	0	0
Total - - - - -	36	28	41	1	106

Table ZV. Disposition of Cases Through Published Opinions

	Affirmed	Aff in Part Rev in Part	Reversed	Remanded	Dismissed	Total
Petition -----	42	3	42	0	1	88
Certification -----	9	0	8	0	1	18
Mandatory Review -----	0	0	0	0	0	0
Total -----	51	3	50	0	2	106

*Table V. Reversals of Special Court-Martial Cases Versus
General Court-Martial Cases Considered by the Courts*

	Special (%)	General (%)	Total (%)
Army -----	6	12(33.3%)	12(33.3%)
Navy -----	7(70%)	11(61.1%)	18(64.3%)
Air Force -----	8(53.3%)	11(42.3%)	19(46.3%)

	Quinn	Ferguson	Kilday	Total
Wrote opinion of Court -----	33	29	24	86g
Concur with opinion of Court -----	42	40	52	134
Concur with separate opinion -----	0	0	2	2
Concur in result -----	1	3	7	11
Concur in part/dissent in part -----	1	4	0	5
Dissent -----	9	10	1	20
Total -----	86g	86g	86g	258

COMMENT

THE COMPATIBILITY OF MILITARY AND CIVIL LEGAL VALUES: MENS REA—A CASE IN POINT.* Two fundamental questions have bedeviled military law since the last World War. Is it a layman's law or a lawyer's law; that is, should it be administered by laymen or lawyers? Are military and civil legal values compatible?

The first question has been answered. For better or worse, military law has become a lawyer's law. Whatever regrets Colonel Wiener may have about courts-martial degenerating into hammer and tongs contests on the Perry Mason pattern,¹ the trend is clear and the logic of the appellate process is working inexorably.

The second question has not yet been answered as clearly. Colonel Wiener believes with General Sherman that military and civil values are incompatible.² He may be on stronger ground here. It has been accepted doctrine for many years. But there is little evidence either way that is not mere opinion. There has been little pre-occupation with values in recent years. Complaints about modern trends no longer center on values as they did in General Sherman's day. The complaints referred to in the 1960 report of The Judge Advocate General center on procedures, burdensome and duplicative procedures, and multiplicity of adversary proceedings. The proudest achievement of the Court of Military Appeals is not that it has disproved General Sherman but that it has written military due process into the Code.³

To an outsider, there is an inexplicable disparity between the range, volume and quality of the work of American military lawyers and the confidence reposed in them. The provision of qualified counsel at courts-martial has not taken the heat off military justice. Why is The Judge Advocate General's Excess Leave Program necessary?⁴ Is the reluctance of Congress to approve legal training for Army personnel' pure cussedness or dilatori-

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

¹ See *Hearings on the Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. (1962).

² See *Hearings on S. 857 and H.R. 4080 before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. (1949).

³ See *Hearings on Constitutional Rights of Military Personnel*, *supra* note 1, at 181.

⁴ Annual Report of The Judge Advocate General, U.S. Army, for 1963, at 71.

⁵ This reluctance is shared by the Australian Treasury.

ness? Or does it stem from a belief that an officer who is indoctrinated by the universities and the law schools before he comes under military influence is less likely to be swamped by military values?

General Sherman feared that military values such as obedience to orders would be emasculated if civil legal values were allowed to intrude.⁶ British generals were no less fearful and General Napier was more vocal.⁷ However, British military law has seen obedience to orders leavened by *mens rea*, a civil value and there has been no suggestion that the Services were emasculated in the process. This comment will examine the law of obedience to orders, a key area of potential conflict between military and civil legal values. It will commence by tracing the impact of *mens rea* on obedience to orders. It then will outline the emergence of negligence as an alternate disciplinary base. Finally, it will conclude by speculating on military jurisprudence.

I. OBEDIENCE TO ORDERS AND *MENS REA*

Mens rea has lost much of the force which it had in the last century. It is being increasingly supplanted by strict liability in criminal law.⁸ The advent of the motor car has developed negligence into a criminal offense. Even as a phrase, *mens rea* is ceasing to be fashionable; it is being replaced by the more neutral phrase "mental element," and *intention* has been displaced by *knowledge* as the dominant "mental element" in many cases.

Mens rea was originally a matter of morality.⁹ Its value lay in its emphasis that an accused should not be punished unless he had a legally reprehensible state of mind. It was wrong to punish a person who had not intended to commit an offense. Since this comment is concerned with values, *mens rea* is used in this older sense.

A. MUTINY

The law governing obedience to orders in the last century was, by modern standards, very strict. This is well illustrated by a short digression on the associated offense of mutiny.

Disobedience of orders could amount to mutiny and single mutiny at that." The British Courts-Martial Appeal Court in *R. v.*

⁶ *Hearings on S. 857 and H.R. 4080, supra* nota 2, at 139.

⁷ See NAPIER, REMARKS ON MILITARY LAW 9-37 (1837).

⁸ See EDWARDS, *MENS REA IN STATUTORY OFFENCES* XIII (1955).

⁹ *Ibid.* See also 1 RUSSELL, CRIME 34 (11th ed. 1958).

¹⁰ HOUGH, THE PRACTICE OF COURTS-MARTIAL 68-111 (1825).

*Grant*¹¹ defined mutiny as collective insubordination, collective defiance or disregard of authority or refusal to obey authority. British military law does not recognize a general offense of individual insubordination. Certain types of insubordinate behavior are offenses; striking or offering violence to a superior or using threatening or insubordinate language." But there is no general offense of insubordination other than mutiny which is collective.

This **gap** in the Code may be attributable to the concept of individual mutiny. The British Court in *R. v. Grant* recognized that mutiny had not always been collective. The textbooks of the last century clearly recognized individual mutiny: Hough in 1825,¹² Griffiths in 1841," Simmons in 1863,¹⁵ and Carey in 1877. Carey stated the offense in an extreme form:

Thus, violence used deliberately against a superior officer and which was more than an outbreak of a hasty or ungovernable temper, disobedience or systematic or deliberate neglect of orders, or any breach of discipline, however trivial, committed under circumstances from which it might be inferred that the aim was to excite others to disobedience or to resistance to lawful authority might all be mutiny. Any act of this nature committed even by one man alone, and without any previous concert with others, might still be mutiny, though others did not join in it, . . . for in all such cases the general assumption is that an unlawful act was unlawfully intended, and that it had an unlawful motive."

Colonel Carey was the Deputy Judge Advocate at the War Office. His work was prepared for publication in 1877 by the War Office. If it had been published, it would have been the first official publication on military law. His opinions may be regarded as representative of British military thinking immediately before the first Army Act of 1879.

The first *Manual of Military Law* was issued in 1884. It did not recognize individual mutiny." A comparison between the Articles of War for 1878 and the first Army Act¹⁸ does not indicate any

¹¹ 41 Crim. App. **R.** 173 at 176 (1957).

¹² [British] Army and Air Force Acts 1955, Sec. 33.

¹³ HOUGH, *op. cit. supra* note 10, at 68.

¹⁴ GRIFFITHS, NOTES ON MILITARY LAW 21 (1841).

¹⁵ SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL 66 (6th ed. 1863).

¹⁶ Carey, Military Law and Discipline 17 (1877) (unpublished).

¹⁷ See [British] MANUAL OF MILITARY LAW 20 (1899). This was the earliest complete edition available to the writer. The 1888 edition which was also available was an abbreviated reprint of the first edition and did not contain all the introductory chapters. A comparison of the 1888 and 1899 editions justifies the inference that the 1899 edition may be regarded as identical with the first edition on the points being considered.

¹⁸ [British] Army Discipline and Regulation Act 1879, sec. 7.

substantial statutory basis for this change in view from the earlier texts. The difference between Carey and the Manual gives a clue to the infusion of *mens rea* into military law. Carey's concluding remarks (quoted above) would have been anathema to a civil lawyer bred on *mens rea*. However, the only part of the first Manual prepared by the Deputy Judge Advocate was the specimen charges. The introductory chapters were written by the Parliamentary Counsel, Sir H. Thring and his assistants. Mr. Fitzgerald of the Parliamentary Bar acted as general editor and was, with Sir H. Jenkins, responsible for the footnotes to the Army Act and Rules of Procedure which have played such a large part in the interpretation of the British Code.¹⁹ The probability is that the Office of Parliamentary Counsel was responsible for the initial infusion of *mens rea*, through the preparation of the first Manual rather than through the drafting of the first Army Act.

A change of a much smaller magnitude is discernible in American military law. Winthrop conceded the existence of single mutiny." However, he perceived the importance of intention in mutiny and regarded some of the older practices as bad because they overlooked the specific intent required to establish mutiny. Winthrop was much more conscious of *mens rea* than Carey and less inclined to relate the law as closely as possible to the requirements of discipline. Except in cases where a mutiny is committed by creating violence or disturbance, single mutiny is no longer recognized by American military law.²¹

B. DISOBEDIENCE OF COMMANDS

The offense of "disobedience of commands" can be traced back to the 1627 Articles of War." In the seventeenth century Articles, it may be significant that the offense was refusing to obey a command. The Mutiny Act of 1718 changed the offense to refusing to obey a lawful command. The Mutiny Act of 1749 changed it again to disobeying a lawful command. No further change occurred until the first Army Act of 1879 which added the aggravated form of disobedience, wilful defiance.

Immediate obedience to orders was placed on a pedestal during the eighteenth and nineteenth centuries. Even civil courts recog-

¹⁹ See preface to first edition.

²⁰ WINTHROP, *MILITARY LAW AND PRECEDENTS* 582 (2d ed. 1920) (reprint).

²¹ See *United States v. Duggan*, 4 U.S.C.M.A. 396, 15 C.M.R. 396 (1954); *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951* [hereinafter cited as MCM, U.S., 1951], para. 173.

²² 5 *JOURNAL ARMY HISTORICAL RESEARCH SOCIETY* 111 (1926).

nized the need. In *Sutton v. Johnstone*, a court which included Lords Mansfield and Loughborough stated: "A subordinate officer must not judge of the danger, propriety, expedience, or consequences of the order he received; he must obey. Nothing can excuse him but a physical impossibility."²³ Only Lord Nelsons were allowed blind eyes.

There was some recognition of human frailties in the last century. It was recognized that the offense of disobeying a command was limited to intentional disobedience. The neglect to obey a command was punishable but under the general article **as** a neglect. Hough stated in 1825:

There is this distinction between a disobedience and a neglect of an order, that in the one case it is wilful, while in the other it may be through forgetfulness, which however, is no plea, since matters of duty ought **to** be recollected.²⁴

This rule was not whittled down in the first Manual. But by a fragmentation process which will be examined later, the importance of *mens rea* was emphasized and a foundation was laid for the ultimate disappearance of unintentional disobedience. The footnotes to section 9 of the Army Act in the first Manual stated that: "An omission arising from misapprehension or forgetfulness is not an offence under this section."²⁵ The footnote did not go on to say that such an omission was punishable under the general article, section 40, as a neglect.

Intentional disobedience had a wider ambit in the last century. It included hesitating to obey. Again, the extreme view may be found in Carey:

The not obeying a lawful command, the hesitating **to** obey it or unnecessary delay in obeying it, are one and all disobedience to a lawful command fully **as** much **as** a positive refusal to **obey**.²⁶

The footnotes to section 9 in the first Manual said nothing about hesitating to obey. So far from referring to the older rule, the footnotes stated: "The disobedience must be immediate or **proximate** to the command, and actual non-compliance must be proved. A man who says 'I will not do it' does not necessarily disobey."²⁷

The older rule did not disappear entirely. In chapter 3 of the introductory section of the Manual, the older rule was stated in a modified form:

²³ [1786] 1 T.R. 546; cited by WINTHROP, *op. cit. supra* note 20, at 672.

²⁴ HOUGH, *op. cit. supra* note 10, at 633.

²⁵ [British] MANUAL OF MILITARY LAW 132 (1888).

²⁶ CAREY, *op. cit. supra* note 16, at 23.

²⁷ [British] MANUAL OF MILITARY LAW 132 (1888).

If the command be a lawful command, and demands a prompt and immediate compliance, hesitation or unnecessary delay in obeying it may constitute disobedience fully as much as a positive refusal to obey, though mere omission or hesitation can seldom constitute the graver offence referred to in the preceding paragraph; but if the command is of a prospective nature, a man, before he can be guilty of disobedience, must have had an opportunity to obey.²⁸

The older rule gradually passed out of the consciousness of the service until the 1951 revision of the *Manual of Military Law*, in which parts of the introductory chapters were transferred to the footnotes. The expanded footnotes to section 9 in the 1951 Manual gave belated prominence to the inconsistency in the first Manual.²⁹ In the 1956 *Manual of Air Force Law*, the inconsistency **was** less apparent. The footnotes to section 34 of the Army and Air Force Acts of 1955 (the former section 9) stated:

The disobedience must relate to the time when the command is to be obeyed. If the command demands a prompt and immediate compliance the accused will have disobeyed if he does not comply at once. If the command is one which has to be complied with at some future time, however short, eg, an order to "parade in ten minutes time" the person to whom it is given cannot be charged under this section till he **has** had, and fails to take, a proper opportunity of carrying out the command, notwithstanding that he may have said that he would not obey the command when given it.³⁰

So far as American military law is concerned, the rules in the last century were similar. Winthrop commented on article 21 that the disobedience must be positive and deliberate. A neglect to obey through heedlessness, remissness or forgetfulness was punishable under the general article.³¹ This has remained well-settled law and has been untroubled by doubts arising from inconsistency in the Manuals.

As in Britain, intentional disobedience had a wider ambit in the last century and included hesitation to obey. Winthrop stated: "The obligation to obey is one to be fulfilled without hesitation, with alacrity and to the full."³² A comparison between Winthrop and Snedeker³³ indicates that the rule on hesitation was similarly modified in America. There is a consistency between Snedeker and the 1956 *Manual of Air Force Law* on the modern rule.

²⁸ *Id.* at 22 (1899).

²⁹ *Id.* at 206 (1951).

³⁰ 1 [British] *MANUAL OF AIR FORCE LAW* 264 (1956).

³¹ WINTHROP, *op. cit. supra* note 20, at 573.

³² *Id.* at 572.

³³ SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* 612 (1953).

C. *DISOBEDIENCE OF ORDERS*

It has been seen that, unintentional disobedience of commands was originally punishable under the general article. So also was the disobedience of orders as distinct from commands. As written, general orders become more voluminous and important, so the disobedience of orders became a separate offense.

Under the British Code, the disobedience of orders emerged as a separate offense in the Articles of War during the last century. It was given a limited form. In the Articles for 1878 it took the form of neglecting to obey any garrison or other orders. It **was** expanded slightly in the first Army Act. Under section 11, it was an offense to neglect to obey any general or garrison or other orders. In the footnotes to section 11 in the first Manual, it **was** made clear that not all orders fell within section 11. Disobedience of Queens Regulations remained punishable under the general article, section 40.³⁴ The situation at the date of the first Manual was that intentional disobedience of commands was punishable under section 9, the unintentional disobedience of commands under section 40, the neglect to obey some orders under section 11, and the neglect to obey other orders under section 40.

At this point, British law **was** affected by two factors which do not appear to have troubled American law: the inconsistent infusion of *mens rea*, and a dual standard of neglect. It was seen earlier that the footnotes to section 9 emphasized that it applied only to intentional disobedience and did not go on to say that unintentional disobedience might be punishable under section 40. The footnotes to section 11 remedied the deficiency and stated: "Disobedience of a specific order in the nature of a command should be dealt with under section 9, and non-compliance through forgetfulness or negligence, with an order to do some specific act at a future time under section 40."³⁵ However, the footnotes to section 40 were not consistent with the footnotes to section 11. The former stated: "Neglect must be wilful or culpable and not merely arising from ordinary forgetfulness or error of judgment, or inadvertence."³⁶

The inconsistency was repeated in the introductory comments. Chapter 3 stated of the offense of disobeying a command other than in a wilfully defiant manner: "To constitute this offense it is essential that the disobedience should be wilful and deliberate, **as** distinguished from disobedience arising from forgetfulness or

³⁴ [British] *MANUAL OF MILITARY LAW* 134 (1888).

³⁵ *Ibid.*

³⁶ [British] *MANUAL OF MILITARY LAW* 162 (1888).

misapprehension which can only be punished under section 40(b)." Footnote (b) stated: "Even under section 40 the neglect must be wilful or culpable and not merely arising from ordinary forgetfulness or error of judgment or inadvertence."³⁷

Possibly the meaning given to words in 1884 gave these passages a consistency which escapes the modern reader. On their ordinary construction today, it would seem that the disobedience of commands or orders through forgetfulness was only punishable where the forgetfulness was out of the ordinary. On this construction it would seem that the rule **as** stated by Hough in 1825 had been whittled down by *mens rea*.

This conclusion can be supported by the meanings given to the word "neglect" in the last century. Hough recognized that neglect was something more than mere inadvertence. Quoting Samuel, he stated:

A neglect may be . . . in a flagrant and gross omission of care, which is usually taken, in legal intentment, as an evidence of fraud . . . Any inferior degree of neglect, though implying an absence of a special refined care, which considerate and more wary persons are in the habit of using in their own affairs, would not amount, it should seem, to that culpable or criminal negligence, so as to expose the party guilty of it to the multiplied penalties of the **article**.³⁸

His comments were related to the offense of wilfully or through neglect suffering provisions to be damaged. Simmons³⁹ and Carey⁴⁰ also treated a neglect as something more than a mere omission but their comments **were** related not to the neglect to obey orders, but to the offense of through culpable neglect omitting to send a return. If as seems likely, two standards of neglect were recognized, the first Manual by aligning the standards eliminated the more venial failures to obey orders.

The initial infusion of *mens rea* was sustained by changes in the later Manuals. No significant change occurred between 1884 and 1929. In the 1929 Manual, unintentional disobedience was written down a little further. The comment in Chapter 3 was revised to read:

To constitute the offense it is essential that the disobedience should be wilful and deliberate, as distinguished from disobedience arising from forgetfulness or misapprehension (which might, however, be punished under **S40**).⁴¹

In this Manual, the footnotes to section 40 for the first time in-

³⁷ *Id.* at 22 (1899).

³⁸ HOUGH, *op. cit. supra* note 10, at 258.

³⁹ SIMMONS, *op. cit. supra* note 15, at 59.

⁴⁰ CAREY, *op. cit. supra* note 16, at 62.

⁴¹ [British] MANUAL OF MILITARY LAW 17 (1929).

cluded a list of offenses commonly charged under the section. Unintentional disobedience was not listed."

A further change occurred in the 1951 Manual which nowhere indicated that unintentional disobedience was an offense under section 40. The comments in Chapter 3 disappeared and the footnote to section 11 also disappeared. There was nothing apart from the terms of section 11 itself to indicate that unintentional disobedience was punishable.

There does not appear to have been a similar whittling down of unintentional disobedience in America and a double standard of neglect appears to have persisted. For instance, in the 1928 *Manual for Courts-Martial*, neglect for the purposes of the seventy-third article was treated as synonymous with negligence.⁴³ But there was no suggestion that neglect for the purposes of the ninety-sixth article was synonymous with negligence. Comment on the sixty-fourth article indicated that the neglect to obey an order through forgetfulness was punishable under the ninety-sixth article.⁴⁴

D. MODERN LEGISLATION

Summarizing the impact of *mens rea*, it may be said that both in Britain and America ⁴⁵ it led to the virtual elimination of single mutiny and to the modification of the hesitation rule. In Britain, it led also to the disappearance of unintentional disobedience of commands as an offense through an evolutionary process which was uninterrupted by two World Wars. In the British setting, the amendments made in the 1955 revision of the Army and Air Force Acts come as a complete surprise. There had been since the first Army Act an inconsistency between section 9 and section 11. Section 9 dealt with the disobedience of commands and said nothing about neglects. Section 11 dealt with the neglect to obey orders and said nothing about disobedience. In the 1955 Acts, section 34, the former section 9, was extended to cover the disobedience of commands "whether wilfully or through neglect." Section 36, the former section 11, was amended to cover the contravention of or the failure to obey orders.

The 1955 revision was the work of a Select Committee of the House of Commons, the Spens Committee. Its reports do not throw much light on these changes. It paid some attention to the mental element which should be associated with various offenses,

⁴³ See *Id.* at 459.

⁴⁴ See *Manual for Courts-Martial*, U.S. Army, 1928, para. 140b (1943 reprint).

⁴⁵ See *Id.*, para. 134b.

⁴⁶ But see note 21 *supra* and text accompanying.

and considered the mental element of knowledge in relation to obedience to orders.⁴⁶ But it devoted little time to the changes to section 34 and 36. It is evident from the Committee's hearings that the amendment to section 36 may be attributed to Mr. Nield who stated:

The wording used is "neglects to obey any orders," and "neglects" infers something more than fails. I wondered if it would meet the question raised if a very short amendment were proposed. I would suggest that Section 11 should read: "Every person subject to military law who commits the following offence: that is to say, fails to obey any general or garrison or other orders, in writing, the contents of which he knows or ought to know"⁴⁷

The committee did not stop to consider whether Mr. Nield was right. The choice of language in its final report suggests that the distinction was not appreciated although incorporated in the Code.⁴⁸

Somewhat similar changes were made in 1950 to the American Code.⁴⁹ But the changes are less surprising since neglecting to obey appears to have retained its original meaning of failing to obey. Whatever the original impact of *mens rea*, it is evident from recent changes to the Codes that its force as a moral value may be spent. There is little difference in criminality between intentional and unintentional disobedience in the Codes and the law reports. In both CM 355845, *Jones*,⁵⁰ and CM 365317, *Scott*,⁵¹ boards of review set aside a finding of wilful disobedience and substituted a finding of failing to obey. In neither case was sentence reduced.⁵² More-

⁴⁶ Report from the Select Committee on the [British] Army Act and Air Force Act ordered to be printed on 20th October 1963, XV, 7, 18-19, 26-27, 333.

⁴⁷ *Id.* at 18.

⁴⁸ *Id.* at XV.

⁴⁹ See LEGAL AND LEGISLATIVE BASIS OF MANUAL FOR COURTS-MARTIAL 1951.

⁵⁰ 7 C.M.R. 97 (1952).

⁵¹ 8 C.M.R. 526 (1952).

⁵² The fact that the cases each involved other offenses is not a reasonable explanation for the failure of the Boards to reduce the sentences because each of the other offenses was minor when compared with failure to obey (in terms of maximum authorized punishment).

However, the implication drawn from these cases is not conclusive. Both were officer cases and the sentences as approved consisted of dismissal only. At the time of the cases the prevailing opinion was that the Board of Review, in reducing punishment could not change its kind, and therefore the Boards in these cases had a choice of approving the dismissals or permitting the defendants to go without punishment.

In a similar case involving an enlisted man, the Board of Review reduced the sentence by more than half. See CM 383911, DiFronzo, 20 C.M.R. 408 (1955). The same result was reached in another enlisted man's case where there was no other offense involved. See ACM-S 1438, Black, 1 C.M.R. 599 (1951). Further, there exists a difference between simple failure to obey and

over, a reversion on the hesitation rule is occurring. In *United States v. Vansant*,⁵³ the Court of Military Appeals referred to what may be described as the preparatory steps rule. The accused who was serving near the front lines in Korea was awakened from his sleep at 12:30 a.m. and told to return to his platoon and be there by 2:00 a.m. He refused to obey. It was argued that the order was an *in futuro* order. The Court held that a certain amount of preparation was necessary and the accused had to walk a mile and a quarter. It held that the order required immediate compliance by way of preparation. There was less justification for the development of the preparatory steps rule in ACM 11351, *Jordan*.⁵⁴ Furthermore, an accused is not necessarily protected when placed in arrest. In *United States v. Stout*⁵⁵ the Court held that the appellant could have obeyed the order even though he had been placed in arrest.

On the above evidence, it is clear that the fears of the generals were groundless. Military values were affected by civil values and it cannot be said that the results in two wars were disastrous. It may be that this was fortuitous. It can be argued that the nature of warfare has changed and but for this change, the results might have been disastrous.

II. *MENS REA* AND NEGLIGENCE

The growth of criminal negligence is normally attributed to the motor car. It will be seen that in British military law, aircraft had an earlier influence. A new factor which is emerging is the recognition that negligence is a useful compromise between *mens rea* and strict liability. It has been said of the Australian High Court that: "Over a period of near sixty years since its inception the High Court has adhered with consistency to the principle that there should be no criminal responsibility without fault, however minor the offence. It has done so by utilizing the very half-way house to which Dr. Williams refers, responsibility for negligence," "If there is a correlation between civil and military values, then negligence should be developing as a more important disciplinary sanction. It is.

willful disobedience at least where the simple failure to obey constitutes another offense with a less serious punishment, because simple failure to obey merges into the other offense for punishment purposes, but a willful disobedience does not. CM 375015, Lattimore, 17 C.M.R. 400 (1954); MCM, U.S., 1951, para. 127c n. 5, at 221. Compare CM 383911, DiFronzo, *supra*.

⁵³ 3 U.S.C.M.A. 30, 11 C.M.R. 30 (1953).

⁵⁴ 21 C.M.R. 627 (1955), *rev'd on other grounds*, 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

⁵⁵ 1 U.S.C.M.A. 639, 5 C.M.R. 67 (1952).

⁵⁶ Howard, *Strict Responsibility in the High Court of Australia*, 76 L.Q. REV. 547 (1960).

A. GENERAL

An illustration of negligence as a half-way house can be found in the seventeenth century articles. The first article of the 1660-1700 articles provided that a soldier who wilfully or negligently absented himself from divine service or sermon would forfeit twelve pence for the first offense." Attendance at church has seldom been a fundamental military value and something less than strict liability could be accepted. But a liability based on negligence was rare in the seventeenth century articles.

In the eighteenth and nineteenth century articles, the concept of neglect was widely used; the concept of negligence not at all. This is well illustrated by the development of the general article. In 1660-1700, the general article dealt with "all other faults, misdemeanours, disorders and crimes not mentioned in these articles."⁵⁵ In 1765, the general article dealt with "all crimes not capital and all disorders or neglects."⁵⁶ The 1765 articles recognized other instances of neglects.

Governors and Officers Commanding who did not ensure that the sutlers supplied the soldiers with wholesome food at market price were answerable for their neglect." Officers who refused or wilfully neglected to hand over to the civil authorities soldiers who had committed an offense against a civilian were punishable." Officers or commissaries who wilfully or through neglect suffered provisions to be damaged were punishable." Soldiers who designedly or through neglect wasted ammunition were punishable." Soldiers who sold, lost or spoilt through neglect their arms or clothing were punishable."

A similar approach was reflected in the 1878 Articles. The general article still extended to neglects.⁵⁷ Officers who failed to supervise sutlers were still answerable for their neglect." Officers who refused or neglected to cry down credit were suspended.⁵⁸ Officers who refused or neglected to make reparation for billeting offenses

⁵⁷ WALTON, HISTORY OF THE BRITISH STANDING ARMY 1660-1700, 809 (1904).

⁵⁸ *Id.* at 817.

⁵⁹ WINTHROP, *op. cit.* *supra* note 20, at 946.

⁶⁰ *Id.* at 936. Section VIII, Article III.

⁶¹ *Id.* at 937. Section XI, Article I.

⁶² *Id.* at 938. Section XIII, Article I.

⁶³ *Id.* at 938. Section XIII, Article II.

⁶⁴ *Id.* at 938. Section XIII, Article III.

⁶⁵ CLODE, MILITARY AND MARTIAL LAW 255 (1872) (Article 105).

⁶⁶ *Id.* at 233 (Article 6).

⁶⁷ *Id.* at 233 (Article 7).

were punishable.⁶⁸ The neglect to obey garrison or other orders was punishable." Officers who through design or culpable neglect omitted to submit returns were punishable.⁷⁰ The refusal or wilful neglect to hand over offenders to the civil authorities was still punishable." Soldiers who lost by neglect their arms or necessities were punishable.*

The approach of the first Army Act was not substantially different, although in coupling together the penal provisions of the Mutiny Act and the Articles of War, many offenses were revised. Some neglect offenses were retained in substantially their old form: the general article;⁷³ the neglect to obey orders;" the loss by neglect of arms or necessities;⁷⁵ by culpable neglect, omitting to submit returns;⁷⁶ and the refusal or neglect to compensate for billeting offenses.⁷⁷ Th the offense of failing to hand over offenders to the civil authorities, wilful neglect was changed to neglect." But the concept of wilful neglect did not disappear from the Code; it appeared as wilful neglect of duty in section 5(3). The word "negligently" appeared in section 6(2)(a).

A significant change was made in the first Air Force Act in 1917 in which special provision was made for flying offenses. The first three offenses in section 39A were:

- (a) Wilfully or by wilful neglect or negligently damages, destroys or loses any of His Majesty's aircraft or aircraft material; or
- (b) Is guilty of any act or neglect likely to cause such damage, destruction or loss; or
- (c) Is guilty of any act or neglect (whether wilful or otherwise) which causes damage to or destruction of any public property by fire.

This section had two important effects. It led to the equation of neglect and negligence. It also imported the value of criminal negligence.

Until the advent of the motor car, the major criminal offense based on negligence was manslaughter. Criminal negligence has developed a special quality to distinguish it from civil negligence. Whether by accident through its association with manslaughter, or by design through common law values, the special quality

⁶⁸ *Id.* at 233 (Article 8).

⁶⁹ *Id.* at 247 (Article 75).

⁷⁰ *Id.* at 250 (Article 84).

⁷¹ *Id.* at 253 (Article 96).

⁷² *Id.* at 255 (Article 102).

⁷³ Section 40.

⁷⁴ Section 11.

⁷⁵ Section 24.

⁷⁶ Section 26.

⁷⁷ Section 30.

⁷⁸ Section 39.

attaching to criminal negligence was the actual or potential danger to life. Since section 39A dealt with flying offenses and since aircraft have often affected life, it was inevitable that this special quality would be written into the footnotes to section 39A. In the 1939 *Manual of Air Force Law*, the footnotes stated:

A distinction is here drawn between neglect which is wilful and neglect which is not. If neglect is wilful, ie, deliberate, it is clearly blameworthy. If it is not wilful it may or may not be blameworthy and the court must consider the whole circumstances of the case and in particular the responsibility of the accused. A high degree of care can rightly be demanded of an officer or airman who is in charge of an aircraft or responsible for its airworthy condition, or who is handling explosives or highly inflammable material, where a slight degree of negligence may involve danger to life; in such circumstances a small degree of negligence may be blameworthy. On the other hand, neglect which results from mere forgetfulness, error of judgment or inadvertence, in relation to a matter which does not rightly demand a very high degree of care would not be judged blameworthy so as to justify conviction and punishment. The essential thing for the court to consider is whether in the whole circumstances of the case as they existed at the time of the offence the degree of neglect proved is such as, having regard to their service knowledge of the amount of care which ought to have been exercised, renders the neglect substantially blameworthy and deserving of punishment.'

Another interesting development was the equation of neglect and negligence through the above footnote. This equation spilled over into other sections of the code, Neglects for the purposes of section 40, the general article, were similarly construed. In the 1939 *Manual of Air Force Law*, the footnotes to section 40 referred readers to the footnotes to section 39A for a definition of neglect.*" It spilled over into the Army Act. The 1951 *Manual of Military Law* defined neglect in the footnotes to section 40 in terms almost identical with those quoted above."

B. DISOBEDIENCE

To revert to disobedience of orders, the common law concept of criminal negligence also spilled over into the neglect to obey orders. The mere failure to obey was not enough; some additional elements related to negligence and the degree of risk to life also had to be proved. If past practice is followed, section 36 of the 1955 Army Act is wider than section 34. This leads to the extraordinary result that orders can be enforced more rigidly than commands. It cannot be argued that the phrase "fails to

⁷⁹ [British] *MANUAL OF AIR FORCE LAW* 251 (1939)

⁸⁰ *Id.* at 252

⁸¹ *Id.* at 256.

MILITARY AND CIVIL VALUES

comply with" in section 36 should be construed as neglects to comply with or negligently contravenes. Although it seems likely that the Spens Committee regarded the phrase as meaning "neglects to comply with," British courts cannot interpret statutes by looking at the confusion in the minds of Parliamentary committees.

If section 34 is so construed, *mens rea* in relation to disobedience of orders becomes a continuing and not a displaced value. The modern approach is to treat negligence as a form of *mens rea*.⁸² The older approach reflected in Russell and Kenny was to distinguish neglect and negligence and to regard neglect as containing no mental element."

C. AMERICAN AND CANADIAN MILITARY LAW

American military law does not seem to have gone through a similar process. This is apparent from the decision in CM 353087, *Neville*.⁸⁴ The sources referred to included Winthrop and Wharton. Winthrop was used as an authority for the statement that neglect of military duty or failure fully to properly perform it is an offense.⁸⁵ Winthrop cited Hough as an authority for this statement but did not discern the double standard reflected in Hough and Simmons. Wharton was used as an authority for the statement that a public officer is required to execute his office diligently and if he fails to do so, he is criminally responsible although the failures may consist in a mere omission.⁸⁶

In America and Canada, the unification of the codes has raised entirely separate problems. Both the British and American naval codes, unlike the military codes contained a general offence of negligence. In the American code, the offence covered the wilful or negligent nonperformance of duty and culpable inefficiency in the performance of duty." In the British code, the offense was and still is the neglect to perform or the negligent performance of a duty." In the British naval manual, the offense is said to cover culpable or wilful neglect, carelessness, indifference or general slackness.⁸⁹

⁸² EDWARDS, *MENS REA IN STATUTORY OFFENSES* 205 (1955).

⁸³ KENNY, *OUTLINES OF CRIMINAL LAW* 33-35 (17th ed. 1958); RUSSELL, *CRIME* 46-49 (11th ed. 1958).

⁸⁴ 7 C.M.R. 180 (1952).

⁸⁵ WINTHROP, *MILITARY LAW AND PRECEDENTS* 722 (2d ed. 1920) (reprint).

⁸⁶ 1 WHARTON, *CRIMINAL LAW* § 168 (12th ed. 1932).

⁸⁷ SNEDEKER, *op. cit. supra* note 33, at 616.

⁸⁸ See *Naval Discipline Act 1957*, 5 & 6 Eliz. 2, c. 53, § 7.

⁸⁹ BR 11, Admiralty Memorandum on Court-Martial Procedure 22 (1958).

performance of duties, derives in part from the general article and in part from the former naval article. It is obvious from the

Article 92(3) of the 1950 Uniform Code, dereliction in the placement of this offence in article 92 that it is related to disobedience of orders. Negligence involves a duty of care. Many duties are specified in orders or regulations. Dereliction of duties is a separate offence only where orders and regulations are silent or where they confer a discretion or state the duty in broad terms.⁹⁰ Where it overlaps disobedience of orders, it provides a third basis of liability. A member who disobeys an order, commits an offense if he intentionally or negligently disobeys or if he fails to obey.

Shortly after the introduction of this offense, Snedeker forecast a clash of values." He pointed out that under the naval article, the degree of negligence must be gross and culpable; but under the military article, neglect was no more than a mere omission. No conflict of values has as yet emerged. The Manual compromised; no special standard was required and the lack of ordinary care was sufficient.⁹² The Manual was followed without question by the Court of Military Appeals in *United States v. Grow*⁹³ and *United States v. McCall*,⁹⁴ and by boards of review in CM 353087, *Neville*⁹⁵ and *Lambert*. "

Canadian case law gives depth to Snedeker's perception. Under section 114 of the Canadian National Defence Act, the negligent performance of a military duty is an offense. However, the most interesting decision of the Canadian Courts-Martial Appeals Board is *R. v. Owen*⁹⁷ which dealt with a charge of negligently hazarding a minesweeper under section 95. It was argued for the appellant that the standard of negligence was that defined in the Criminal Code; a wanton or reckless disregard for the lives or safety of other persons. The Board disagreed and held that the standard was that of the capable, prudent and careful captain,

One member of the Board, with the concurrence of two other members, examined in detail negligence in relation to the Canadian and British Merchant Shipping Acts. This corresponded more closely with criminal negligence as defined in the Criminal Code.

⁹⁰ As to broad duties, see NCM 5505370, Moore, 21 C.M.R. 544 (1956).

⁹¹ SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 616 (1953).

⁹² MCM, U.S., 1951, para. 171b. Compare MCM, U.S., 1951, para. 198b.

⁹³ 3 U.S.C.M.A. 77, 11 C.M.R. 77 (1953).

⁹⁴ 11 U.S.C.M.A. 270, 29 C.M.R. 86 (1960).

⁹⁵ 7 C.M.R. 180 (1952).

⁹⁶ 10 C.M.R. 294 (1953).

⁹⁷ No. 2/1959 (unpublished opinion).

It was distinguished on the ground that Parliament had in the National Defence Act specifically adopted a lower standard.

Unfortunately the judgment did not examine the history of the military and naval codes. It is significant that the naval codes developed a general offence of negligence and that the military codes did not. An obvious explanation is that negligence on board ship could have a profound effect on the safety of the ship and the lives of the crew. Although this is not supported by the construction currently given to section 7 of the British Naval Discipline Act, it is supported by history. In the naval articles quoted by MacArthur in 1813, article 27 provided that: "No person in or belonging to the fleet shall sleep upon his watch or negligently perform the duty imposed on him or forsake his station."⁸⁸ Negligence was clearly related to the safety of the ship.

It would seem that while there may be a divergence between military and civil values on negligence under Canadian law, there is no divergence under American law. Again the fears of the generals have been groundless. They might well be pleased with the way in which negligence is being developed as an alternate disciplinary base. By imposing duties in orders and by substituting the written for the spoken word, negligence is no less effective a sanction than disobedience of orders. The serviceman is as vulnerable to negligence today as he was to disobedience of orders, in the last century. He had no defence to the latter but the rare chance of establishing that obedience was physically impossible or the command was unlawful. He has few defences to negligence. Damage does not have to be proved and there is no escape through the intricacies of causation. There is no legal restraint on the power to impose duties in orders, so long as the limited area in which servicemen are recognized as having human rights is not invaded. Inability to perform the duty is a recognized defence but this does not cover the problem of multiple duties. So many duties may be imposed that they cannot all be performed. Moreover, the test of negligence is the objective standard of the reasonable man and proof of the standard is not required. The service knowledge of the court can be applied without proof of the actual standard. The mental element of knowledge of the duty can be offset by constructive knowledge.

The strict approach to disobedience of orders was tempered by *mens rea*. It is difficult to see how negligence can be tempered by *mens rea*. In establishing intention, the conflict between

⁸⁸ 1 MACARTHUR, PRINCIPLES AND PRACTICE OF NAVAL AND MILITARY COURTS-MARTIAL 334 (4th ed. 1813).

subjective and objective standards is very much alive.⁹⁹ In establishing negligence, the objective standard is traditional. Unless the distinction between advertent and inadvertent negligence¹⁰⁰ becomes a firm legal value and the subjective standard is applied to advertent negligence, *mens rea* can play no part.

III. MILITARY JURISPRUDENCE

Two centuries ago, the British system of criminal trials was generally conceded to be the most advanced and enlightened in Europe. There was less enthusiasm and respect for the British approach to punishment.¹⁰¹ It may be true to say that the pre-occupation with due process has made the American system of criminal trials the most advanced and enlightened in the Western World. But would Jones and Scott feel satisfied that justice had been done in their cases?¹⁰² Their legal fault was downgraded on review from intentional to unintentional disobedience; their sentence remained unchanged. These cases can be distinguished on the grounds of the occasional reluctance of appellate authorities to interfere with sentence. But is a code which permits punishment of disobedience of orders irrespective of the degree of legal fault, whether intentional, negligent or unintentional, properly based on legal values?

This weakening of traditional legal values is compounded by the corrective approach to sentence. There can be no doubt of the value of correction or retraining centres such as Amarillo. However, the criterion of a modern retraining centre is not the degree of legal fault expressed in the quantum of punishment but the personality of the offender. If a properly adjusted personality can be created within a reasonable period of time, the offender is adjusted; if not, he is discharged.¹⁰³ However admirable this may be, it destroys the traditional relationship between legal fault and

⁹⁹ The secession of the Australian High Court from the House of Lords centered on this point. See Dixon CJ in *Parker v R* 37 ALJR 3; editorial comment at 37 AUSTL. L. J. 1 (1963) and [1963] CRIM. L. REV. 461; Morris and Travers, *Imputed Intent in Murder, or Smith and Smyth*, 35 AUSTL. L. J. 154 (1961); Howard, *Australia and the House of Lords* [1963] CRIM. L. REV. 675.

¹⁰⁰ GLANVILLE WILLIAMS, *CRIMINAL LAW* 58, 100-124 (2d ed. 1961).

¹⁰¹ 1 RADZINOWICZ, *HISTORY OF ENGLISH CRIMINAL LAW* 712-724 (1948).

¹⁰² See notes 50-52 *supra* and text accompanying.

¹⁰³ Hippchen, *The Air Force's Therapeutic Community Concept* [1963] AMERICAN JOURNAL OF CORRECTION 14. For a conservative but illuminating attack on this approach to punishment, see Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATE [now the Melbourne University Law Review] (1953).

sentence. If legal fault is written out of finding and sentence, a criminal trial becomes a mechanical process unqualified by legal values other than those embodied in due process.

It is easy for an outsider to misconstrue American law. Due process has a significance in America which it may not have elsewhere. It may be true **as a** broad generalization that whereas British law tends to emphasize values, American law tends to emphasize **process**.¹⁰⁴ Nevertheless, however desirable due process may be as a social or professional objective, the end result of a criminal trial for those who are convicted is sentence. It may be that something more than due process is needed.

In this setting, the criticism of Colonel Weiner that modern changes are divorcing the administration of the code from the consciousness of the **service**,¹⁰⁵ takes on a deeper significance. When the code **was** administered by laymen, there was more concern with guilt and innocence and less with legal niceties. Military lawyers since 1950 have acquired a wider role as **censors morum**. It is not confined to law officers at courts-martial for it can be exercised at the pre-trial stage. If it is discharged responsibly, military justice will remain within the conscience and consciousness of the service. It is no less important that it remain within the conscience and consciousness of the nation as a whole. To discharge the role of **censor morum** responsibly, a jurisprudential base seems no less important than due process.

Military jurisprudence presents a special problem. An interesting feature of present day criminal law, particularly in England, is the increasing attention being given to a re-appraisal of the more fundamental legal values.¹⁰⁶ There has been little speculation about the timing of the re-appraisal. It could not have occurred twenty years ago. In time of war, social values must stand fast. As the threat of war recedes, so it becomes safer to re-appraise values. But has it become safer to re-appraise military legal values? While society might believe that the threat of nuclear war is receding, the Armed Forces cannot work on this

¹⁰⁴ The generalization appears valid in administrative law. See Davis, *English Administrative Law—An American View*, [1962] **PUBLIC LAW** 139; Jaffe, *English Administrative Law—A Reply to Professor Davis*, [1962] **PUBLIC LAW** 407.

¹⁰⁵ See *Hearings on the Constitutional Rights of Military Personnel before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. (1962).

¹⁰⁶ An excellent survey is given in Smith, *The Literature of the Criminal Law 1954–1963*, [1964] **CRIM. L. REV.** 96. See also Wood, *General Principles of Criminal Law—A Ten Years' Retrospect* [1964] **CRIM. L. REV.** 9.

premise. The Forces have had to digest the 1950 Uniform Code and the impact of the Court of Military Appeals. It is not surprising that one complaint of the generals of today has been the lack of stability in the administration of the code.¹⁰⁷ It would not be surprising if military lawyers preferred to administer the code mechanically for the present. This problem should mould but not inhibit military jurisprudence.

Several areas seem particularly promising for the development of an appropriate body of jurisprudence. The first is sentencing theory, an area traditionally neglected by lawyers. Logically, criminology and jurisprudence are related disciplines through a common concern with the functions of punishment.¹⁰⁸ By mutual agreement, sentencing theory has been left to criminologists. Legal values such as *mens rea*, and their effect on sentencing theory, have been ignored. It was necessary for criminologists to disassociate themselves from legal values so that an independent discipline could be established. Some of the early schools lost their vigour through too close an association with law.¹⁰⁹

A possible reason for the dis-association of lawyers from sentencing is perhaps more important. A number of variable factors in sentencing are determined by the judge but these are relatively unimportant. The most important factor in sentencing, legal fault, is determined by the finding, not by the sentence. By writing values such as *mens rea* into criminal offences and by relating the quantum of punishment to the seriousness of the offence, criminal lawyers wrote themselves out of sentencing. Although this theory has yet to be proved, Radzinowicz in his monumental survey of British criminal law saw a connection between the subjective approach to criminal responsibility and the views of Bentham on punishment.¹¹⁰

Modern thinking is that punishment should fit the offender, not the crime; Legal values can be blended with criminological thinking by regarding *mens rea* as a practical prediction technique.” If the object of sentencing is to minimize the incidence of crime and if an unintentional offender is unlikely to repeat the offence, there is no need to sentence ‘him.

¹⁰⁷ Annual Report of The Judge Advocate General, U. S. Army for 1959.

¹⁰⁸ MORRIS, THE HABITUAL CRIMINAL 15 (1951).

¹⁰⁹ See generally RADZINOWICZ, IN SEARCH OF CRIMINOLOGY (1961).

¹¹⁰ RADZINOWICZ, HISTORY OF ENGLISH CRIMINAL LAW 712-724 (1948).

¹¹¹ The author acknowledges his indebtedness to Stanley Johnston, Head of the Criminology Department, University of Melbourne for this idea and for his general stimulus.

Such a drastic re-orientation of legal values will not readily be accepted. Criminologists will be less prone than lawyers to reject it. One preliminary step which must be taken is to rationalize the functions of sentencing. There has been a tendency to treat the various functions of sentencing as mutually **exclusive**.¹¹² As a basis for modern re-training techniques, it has been necessary, for instance, to emphasize the corrective function of sentencing. In fact, all except the retributive function of sentencing are compatible and are no more than different techniques of social control.

The retributive or punitive function has played a useful part in emphasizing the social impact of sentencing and the need to move no faster than enlightened thinking in the community.¹¹³ In time, it may be appreciated that sentencing need not have a retributive function and that **as** a concept, it is similar to the old distinction between offences *mala in se* and *mala prohibita* which Professor Fitzgerald has recently revived.¹¹⁴ Its usefulness lies in the fact that society can hold fast to the more important criminal values while others are re-oriented.

Stephen's classic statement of the sentencing art is ceasing to be valid. Punishment stands in the same relationship to the passion of revenge as marriage to the sexual passion. Just as extra-marital relations are frowned on, so are extra-judicial punishments. Judges are ordained by society to punish. They know that sentences which are too lenient or too severe and as such outside the socially accepted range, lead to a loss of public confidence in their ability to discharge their role and so stimulate extra-judicial sanctions. These views are no more than could be expected of a leading British judge of the last century. There is at least a possibility that the Victorian attitude to punishment will be regarded as no more appropriate now than the Victorian attitude to sex.

A less drastic re-orientation has been indicated by Howard in his thesis on strict responsibility.¹¹⁵ Its growth suggests that at least so far as regulatory offences are concerned, legal fault is being transferred from the prosecution to the defense through a reversal of the onus of proof. The British Air Force Act (1955) provides one clear-cut illustration of this trend.¹¹⁶ The interests of the State are regarded as justifying this reversion of values.

¹¹² MORRIS, *op. cit. supra* note 106.

¹¹³ *Id.* at 13.

¹¹⁴ Fitzgerald, *Crime, Sin, and Negligence*, 79 L.Q. REV. 351 (1963).

¹¹⁵ HOWARD, *STRICT RESPONSIBILITY* (1963).

¹¹⁶ Section 46.

The Armed Forces can fairly claim the benefit of State interests. Although there are some military crimes which can be regarded as *mala in se*, most military offences are regulatory in character. The special problem of military jurisprudence can be met by accepting the decline in legal values as inevitable and by incorporating the most convenient cross-currents of legal thinking.

Whatever promise the future may hold, it is necessary to spell out what courts-martial in earlier years may have understood instinctively. There can be no jurisprudence which does not explain the purpose or function of law. Both criminology and comparative law suggest that the purpose of the criminal law is social control and that it is no more than one of several techniques of control.

Just as punishment or retribution can be regarded as a primitive form of sentencing, so also can criminal sanctions be regarded as a primitive form of social control. When better controls are developed and the conduct ceases to be a threat to society, the need for criminal sanctions disappears. In the last century, alcohol posed a threat to society in Britain and it was contained by punitive controls. As society learned to live with alcohol, this was no longer necessary. The development of the motor car raised the threat of alcoholism in the new form of drunken driving and there has been a reversion to criminal sanctions until other controls take up.

This is no less true of the military. In the middle of the last century, one-third of all court-martial convictions in the British Army were for habitual drunkenness. Armies, like society, have since learned to live with alcohol. Mutiny is a classic example of the concept of criminal sanctions as a reaction by society to threats to it. A mutiny can strike at the heart of a military organization; at its continued existence as a disciplined force. In earlier centuries, it was a real and continuing threat which would no doubt justify the old concept of single mutiny. Times have changed. In 1801, Grose gave the following advice to quarter-masters:

If the soldiers complain of the bread, taste it and say that better men have ate much worse. Talk of the bompernicke, [sic] or black rye bread of the Germans, and swear you have seen the time when you would have jumped at it. Call them a set of grumbling rascals, and threaten to confine them for mutiny. This, if it does not convince them of the goodness of the bread, will at least frighten them, and make them take it quietly.”

¹¹⁷ Quoted in SHEPPARD, RED COAT 6 (1952).

In 1964, military lawyers can write about the soldier's right to a private life without being accused of inciting mutiny.'" There is no threat.

Comparative law provides additional support. A U.N. seminar in Japan in 1960 on the role of the criminal law reached some well balanced conclusions.¹¹⁸ There was general agreement on the need to find a balance between the social protection functions of criminal law and the need to safeguard human rights. The balance varied. What would be a just balance in one country would be unjust in another because of social, economic and political differences. The broad perspective of the seminar can be useful. When viewed nationally, legal values and processes can be seen as an end in themselves. They can become so enshrined as national values that it is easy to forget that they are merely techniques of social control. The seminar also observed that the criminal law was only one form of social control.

It may be that disciplinary and administrative sanctions are complimentary. The suspicion that the American Forces were using administrative sanctions to by-pass the Court of Military Appeals led to a searching investigation of constitutional rights.'" It is necessary to ensure that there is a just balance in the application of administrative sanctions. It seems no less important to ascertain why administrative sanctions are used and whether they are functioning properly as techniques of social control. The greater danger in the over-use of administrative discharges as a sanction for misconduct may be ineffective sentencing. By rejecting its too-hards, military control is obtained at the expense of social control.

Criminology and comparative law can help in developing military jurisprudence but the main impetus must come from within the Armed Forces. One fundamental problem is the circumstances in which disciplinary and administrative sanctions should be permitted as a substitute for management. Clearly they can be used as an aid to management but it is less certain that they can be used as a substitute. In an important operation, care will be taken to prevent failure through unintentional disobedience of orders. In what circumstances should disciplinary sanctions alone

¹¹⁸ See *Murphy, The Soldier's Right to a Private Life*, 24 MIL L. REV. 97 (1964).

¹¹⁹ *1960 Seminar on the Role of the Substantive Criminal Law in the Protection of Human Rights and the Purpose and Legitimate Limits of Penal Sanctions*.

¹²⁰ *Hearings on the Constitutional Rights of Military Personnel*, *op. cit.* *supra* note 105 at 2.

be used to prevent unintentional disobedience? A tremendous effort is put into ensuring the operation of complex ships, aircraft and missiles without fault. Some effort should be put into operating people without fault.

IV. CONCLUSIONS

The worries of the generals in the last century have proved groundless. Although there was an alignment of civil and military values through *mens rea*, the effectiveness of the Armed Forces was not prejudiced. This alignment has been undermined by a decline in legal values which is not confined to military law. Legal fault is being divorced from the trial process. To sustain military lawyers in their role as *censors morum*, a jurisprudential base in which civil values are reflected, is required. It may be possible to capitalize on the decline in values by transferring legal fault from finding to sentence. The **task** of military jurisprudence is to determine the circumstances in which disciplinary and administrative sanctions should **be** used. A framework can be provided by criminology and comparative law. If it is filled responsibly and consistently with their dual professionalism, military lawyers will be entitled to the role of *ensor morum*.

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